Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SPRINT NEXTEL CORPORATION AND
T-MOBILE USA, INC.
Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES, *ET AL.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), prohibits states and localities from regulating the "rates charged" by wireless carriers, but does not preempt regulation of "other terms and conditions" of wireless service. The Federal Communications Commission held that state and local laws prohibiting wireless carriers from using "line items" on their bills to recover taxes and fees from their subscribers are preempted by section 332(c)(3)(A). The Eleventh Circuit reversed. The questions presented for review are:

1. Whether the Eleventh Circuit erred by relying on the presumption against preemption to guide its analysis of section 332(c)(3)(A) under *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

2. Whether the Eleventh Circuit erred by overturning the FCC's preemption decision under the first step of the *Chevron* analysis on the ground that Congress unambiguously preserved state and local laws prohibiting line item charges on wireless bills.

PARTIES TO THE PROCEEDING

The petitioners are Sprint Nextel Corporation and T-Mobile USA, Inc.

Respondents who were petitioners in the court of appeals below are: the National Association of State Utility Consumer Advocates and the Vermont Public Service Board.

Respondents who were respondents in the court of appeals below are: the Federal Communications Commission and the United States of America.

Respondents who were intervenors in the court of appeals below are: the National Association of Regulatory Utility Commissioners, AT&T Corporation, Cingular Wireless LLC, Leap Wireless International, Inc., Verizon, and the Cellular Telecommunications & Internet Association.

RULE 29.6 STATEMENT

Sprint Nextel Corporation ("Sprint Nextel") was formed by the recent merger of Sprint Corporation ("Sprint") and Nextel Communications, Inc. ("Nextel"), which was consummated on August 12, 2005. Sprint Nextel is a publicly traded corporation with no parent company. As of this filing, Sprint Nextel's records reflect that no publicly held company holds a 10 percent or greater ownership interest in Sprint Nextel.

T-Mobile USA, Inc. is an indirect wholly owned subsidiary of Deutsche Telekom AG ("DT"), which is a publicly held company (NYSE:DT) organized under the laws of the Federal Republic of Germany. DT is a holding company whose subsidiaries engage in telecommunications and related businesses. T-Mobile USA, Inc., together with others of DT's wholly owned subsidiaries, comprise DT's wireless division.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 457 F.3d 1238. The decision of the Federal Communications Commission ("FCC" or "Commission") (Pet. App. 38a-140a) is reported at 20 F.C.C.R. 6448.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2006, and rehearing was denied on November 29, 2006. Pet. App. 34a-35a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 332 of the Communications Act, 47 U.S.C. § 332, is set forth at Pet. App. 159a-168a.

STATEMENT

In 1993, Congress adopted section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), which bars states and localities from regulating "the entry of or the rates charged" by wireless carriers. Congress added that, by enacting section 332(c)(3)(A), it was not preempting state and local regulation of the "other terms and conditions" of wireless service. Since then, wireless carriers generally have structured their rate plans to operate largely without regard to state boundaries. However, wireless carriers typically use "line items" – discrete charges on their bills that may vary by jurisdiction – to collect taxes and fees. They do so in order to make clear that some charges result from taxes and fees and because the use of line items permits carriers to collect taxes and fees only from subscribers in the taxing jurisdiction.

States and localities increasingly have imposed taxes and fees on wireless service. They also have recently taken steps to hide those taxes and fees from consumers by prohibiting wireless carriers from using line items to collect them. Construing section 332(c)(3)(A), the FCC held that line items are "rates charged" by wireless carriers and, therefore, that states and localities may not prohibit wireless carriers from using line items. After stating that the "presumption against preemption ... guides our understanding of the statutory language," the Eleventh Circuit vacated the FCC's decision. Pet. App. 23a. The court concluded that "section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." *Id.* at 25a.

The conclusion that Congress unambiguously addressed line items in section 332(c)(3)(A) and gave states and localities the ability to ban them is plainly wrong. As the D.C. Circuit stated in *Cellular Telecommunications Industry Ass'n ("CTIA") v. Federal Communications Commission ("FCC")*, 168 F.3d 1332, 1336 (D.C. Cir. 1999), "Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless services." The FCC's interpretation of "rates charged" to include any "discrete charge identified separately on an end user's bill," Pet. App. 65a, was entirely reasonable – and fully in accord with the dictionary definitions on which the Eleventh Circuit based its contrary decision. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court should have upheld the FCC's decision.

The decision below enables states and localities to hide taxes and fees from consumers. Bans on the use of line items may also effectively export taxes and fees to subscribers in other jurisdictions because wireless carriers may choose to raise rates nationally rather than adjust their rates in each

jurisdiction. Alternatively, carriers may adjust their other rates so that, for example, monthly charges vary from state to state. But as the FCC has determined, undesirable consequences would result, including making it more difficult for consumers to compare the rate plans offered by different wireless carriers.

More generally, the Eleventh Circuit's decision will impede efforts to avoid unnecessary regulation of the competitive wireless industry because the court erroneously read section 332(c)(3)(A) to unambiguously preserve state and local regulation. That provision does not "preserve" anything – it merely states that *Congress* did not intend to preempt certain matters by preempting state and local regulation of rate and entry issues, while not affecting the ability of the FCC to preempt when it determines that additional regulation is unwarranted.

Furthermore, the Eleventh Circuit's invocation of the presumption against preemption to guide its analysis was erroneous and has broad applicability, affecting many industries other than the wireless industry. One of the issues presented in *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (U.S. argued Nov. 29, 2006) involves the relationship between the presumption against preemption and judicial review under *Chevron*. *See* Pet. Br. in 05-1342 at i. Depending on how the Court resolves that case, it may be appropriate to grant this petition and vacate the decision below in light of the Court's decision. Alternatively, it may be appropriate to grant this petition to determine whether the Eleventh Circuit erred by invoking the presumption against preemption and then concluding that section 332(c)(3)(A) unambiguously preserved state and local laws prohibiting the use of line items.

1. ***Wireless billing practices***. The most popular wireless rate plans include a monthly charge for a "bucket of minutes"

and separate charges for other items. For example, Nextel offers a plan that provides 450 minutes per month for $39.99 with additional minutes for $0.45. Those terms are available nationally. *See* http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlanDetails?PLAN_ID=UPP1003. Taxes and fees are collected by means of line items that vary by state and locality. *Id.* Collectively, those terms comprise the "rate structure" of the plan. Each of the charges – the monthly charge for the bucket of minutes, the per-minute charge for additional minutes, and the taxes and fees – are "rate elements." *See Am. Tel. & Tel. Co.*, 74 FCC 2d 226, 235 (1979).

State and local governments have increasingly imposed gross receipts or similar taxes on wireless service and instructed wireless carriers that they may not pass those taxes through to subscribers by means of line items. In the Order overturned by the Eleventh Circuit, the FCC cited three laws banning carriers from using line items to collect such taxes and fees, each of which the Commission determined to be preempted by section 332(c)(3)(A). Pet. App. 66-68a & n. 87. In addition, two federal district court judges in Washington recently overturned another state law prohibiting the use of line items to collect state taxes. *See Peck v. Cingular Wireless, LLC*, No. C06-343Z (W.D. Wash. Oct. 24, 2006), *appeal docketed*, No. 06-36027 (9th Cir. Nov. 30, 2006) (Pet. App. 141a); *Hesse v. Sprint Spectrum, L.P.*, No. C06-0592-JCC (W.D. Wash. Jan. 18, 2007) (Pet. App. 151a).

The rationale state and local regulators provide for prohibiting line items is that particular taxes and fees are imposed on wireless carriers rather than upon subscribers. For example, the Indiana Regulatory Commission told carriers that the state gross receipts tax, unlike a sales tax, is not a tax on subscribers – even though, like a sales tax, the amount of the tax is determined by subscriber revenues – and instructed carriers not to pass it through to subscribers by

means of line items, although carriers could increase their other rates on account of the tax. Pet. App. 159-60a. In reality, any sales tax may be converted to a gross receipts tax simply by changing the name of the tax. By doing so, and prohibiting carriers from using line items to collect the tax, a state or locality effectively hides the tax from subscribers. Prohibiting line items may also effectively export the tax to residents of other jurisdictions. For example, using the Nextel rate plan example provided above, if some jurisdictions prohibit Nextel from using line items it might decide to raise its monthly charge for all subscribers. Raising monthly rates nationwide would mean that a prohibition on line items caused a rate increase outside the jurisdictions imposing the taxes.

Alternatively, Nextel might adjust its rate plans so that, for example, subscribers pay $43 per month for a bucket of 450 minutes in a state with a $3 tax, $42 in a county with a $2 tax, and keep the monthly fee at $40 in a jurisdiction with no tax. But Nextel could not then advertise nationally its $40 per month for 450 minute rate plan, and it would be more difficult for consumers to compare Nextel's plans with those offered by other carriers. As the FCC stated, in that case the "patchwork of inconsistent rules" regulating line items "would undermine the benefits derived from allowing CMRS ["commercial mobile radio service"] carriers the flexibility to design national or regional rate plans." Pet. App. 75a.

2. ***The FCC's Order.*** In the FCC Order that was overturned by the Eleventh Circuit, the Commission concluded that "state regulations requiring or prohibiting the use of line items . . . constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act." Pet.

App. 65a.[1] The Commission explained that "rates charged" does not refer only to "rate levels" – the amount of particular charges – but also extends to prohibitions on the use of particular "rate elements" that comprise a carrier's "rate structure." *Id.* at 66a. Thus, a state or local government may not prohibit a carrier from using a monthly fee, or a per-minute charge, or a line item, each of which is a "rate element." The Commission noted that it had recently equated "line items" with "rate elements" in permitting carriers to recover federal universal service contributions. *Id.*[2] The Commission gave three examples of state laws preempted as a result of its decision, two of which prohibited the use of line items to recover gross receipts taxes and one of which prohibited the use of line items to recover a state universal service fee. *Id.* at n. 87.[3]

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[1] Section 332(c)(3)(A) states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

[2] Section 254 of the Communications Act, 47 U.S.C. § 254, governs "universal service." It permits the FCC and states to require carriers to make "contributions," typically calculated as a percentage of revenues, to funds used to defray the cost of telecommunications service in certain areas – usually areas that are not densely populated and therefore more costly to serve. The FCC permits carriers to pass federal universal service contributions through to consumers by means of line items. 47 C.F.R. § 54.712(a).

[3] The Commission also found one example of a state law *requiring* the use of a line item. *Id.* at n. 88. We agree with the Commission that, as a logical matter, such laws also constitute regulation of the rates charged by wireless carriers. As a practical

The Commission noted that it previously had concluded that regulation of the "rates charged" by wireless carriers could not reasonably be limited to regulation of "rate levels" – the amount of particular charges – but necessarily extended to rules affecting rate structures and rate elements. Pet. App. 66a. In *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19,898, 19,908 (1999), the Commission concluded that rules prohibiting carriers from "rounding up" to determine minutes of use and from charging for incoming calls regulated the "rates charged" by wireless carriers because such rules affected the rate structures used by wireless carriers. The conclusion that "rates charged" necessarily includes more than rate levels follows from this Court's conclusion in *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998), that "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."

The FCC made clear that it was not limiting "a state's authority to impose taxes or other regulatory fees" on wireless carriers. Pet. App. 71a. Nor was it preempting "state regulations that address the disclosure of whatever rates the CMRS provider chooses to set." *Id.* at 72a. Rather, it was preempting only state and local laws requiring or prohibiting the use of line items because of their "direct effect on the CMRS carrier's rates and rate structure." *Id.* at 73a. The Commission explained that Congress had directed that wireless rates are to be set in the competitive marketplace and, "To succeed in this marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to

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matter, however, such requirements are unusual and do not present the serious practical problems caused by *prohibitions* on the use of line items.

structure their offerings on a national or regional basis." *Id.* at 74-75a. The Commission concluded: "Efforts by individual states to regulate CMRS carriers' rates through line item requirements ... would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS" because "there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans." *Id.*

3. ***The Eleventh Circuit's Decision***. The Eleventh Circuit vacated the FCC's preemption decision. The court's analysis began "with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." Pet. App. 22a (citation omitted). "Although the presumption against preemption cannot trump our review of the Order under *Chevron*," the court stated, "this presumption guides our understanding of the statutory language that preserves the power of the states to regulate 'other terms and conditions.'" *Id.* at 23a, *citing Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996).

The court held that "[t]he language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." Pet. App. 25a. The court relied primarily on the definition of a "rate" in the Oxford English Dictionary ("OED"), which defines "rate" as "[t]he amount of a charge or payment ... having relation to some other amount or basis of calculation." *Id.* The court concluded: "The prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. ... Because the presentation of line items on a bill is not a 'charge or

payment' for service, ... it is an 'other term or condition' regulable by the states." *Id.* at 26a. In the court's view, therefore, the Commission erred by concluding that "state regulation of the use of line items 'directly intrudes upon the carrier's ability to set rates and establish rate structures for [wireless] service.'" *Id.*

Although initially stating that prohibiting line items "does not affect the amount that a user is charged for service," *id.*, the court later said, "[t]hat the prohibition or requirement of a line item has some effect on the charge to the consumer does not necessarily place a regulation within the meaning of 'rates' and outside the ambit of state regulation of 'other terms and conditions.'" *Id.* at 28a. In particular, the court could not see how it made sense for the FCC to permit states to impose universal service charges on carriers but prohibit states from barring carriers' use of line items to collect those charges. To the contrary, in the court's view, "prohibiting the use of line items has an even more attenuated relationship with rates" than permitting states to impose universal service charges. *Id.* at 29a.

The court also stated that the Commission "misconstrued the legislative history of section 332(c)(3)(A)," which provides that "other terms and conditions" includes matters such as "'customer billing information and practices and billing disputes and other consumer protection matters.'" *Id.* at 31a, *quoting* H.R. Rep. No. 103-111 at 211 (1993). The court agreed with the Commission that substance rather than form should determine whether rules regarding line items should be considered "rates charged" or "other terms and conditions" of wireless service. Pet. App. 31a. But it stated that "[i]f the presentation of line items on consumer bills were a matter of 'rates' and not an 'other[] term or condition[]' of wireless service, then the Commission would be free to preempt virtually any form of state regulation of

wireless service, including laws regarding disclosure and consumer protection." *Id.* at 32a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit erred by holding that Congress unambiguously preserved state and local authority to prohibit the use of line items. As a practical matter, its decision will encourage state and local governments to adopt and hide taxes on wireless service. That will increase the cost of wireless service as well as obstruct wireless carriers' ability to offer national rate plans that collect taxes from subscribers in the taxing jurisdiction.

The decision also will interfere with the FCC's ability to exercise its power to preempt unnecessary state and local regulation. In 1993, Congress gave the FCC plenary authority to regulate wireless service, but simultaneously instructed the FCC to deregulate as competition developed. The wireless industry is now vigorously competitive and regulation should be decreasing rather than increasing. But the Eleventh Circuit's determination that Congress unambiguously preserved state and local regulatory authority will encourage the adoption of additional state and local regulations, contrary to Congress's directive. Particularly because the scheme for review of FCC decisions established in the Hobbs Act will likely result in review of any FCC decision preempting state and local regulation in the Eleventh Circuit, this Court should grant certiorari now to correct the Eleventh Circuit's erroneous interpretation of section 332(c)(3)(A) and to prevent future interference with efforts to deregulate the competitive wireless industry as Congress intended.

In addition, the Eleventh Circuit's invocation of the presumption against preemption was erroneous and will affect cases involving many different regulatory regimes. This Court heard argument in *Watters v. Wachovia Bank,*

N.A., No. 05-1342, in November 2006, in which the petitioner argued that a federal banking regulation is not entitled to *Chevron* deference on account of the presumption against preemption. As the Court's grant of certiorari in *Watters* indicates, the relationship between *Chevron* and the presumption against preemption is an important question of federal law that warrants review by this Court. It may be that the Court will resolve the issue in *Watters* in a manner that should result in the Court granting our petition, vacating the Eleventh Circuit's decision, and remanding for further proceedings. Alternatively, the Court may not reach the issue in *Watters*, in which case it should grant this petition.

I. THE ELEVENTH CIRCUIT WAS WRONG ON THE MERITS.

The Eleventh Circuit's decision is rife with error. There was no basis for the court to conclude that Congress "unambiguously" determined that laws regulating line items are not a form of rate regulation within the meaning of section 332(c)(3)(A). Congress simply did not address such laws in the text of the statute. Nor does the legislative history provide any basis to think that it was concerned about them. In *CTIA*, 168 F.3d at 1336, the D.C. Circuit emphasized that "Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless services." That accurate statement cannot be reconciled with the Eleventh Circuit's view that Congress unambiguously drew the line between regulation of "rates charged" and regulation of "other terms and conditions" of wireless service. Congress certainly did not precisely address the treatment of line items under section 332(c)(3)(A), as would be required to overturn the FCC at the first step of the *Chevron* analysis.

Nor does the Eleventh Circuit's reliance on the OED's definition of "rate" – "the amount of a charge or payment ... having relation to some other amount or basis of calculation," Pet. App. 25a – provide support for the court's decision. As a district court concluded after the Eleventh Circuit issued its decision, "a line item is one of the charges a wireless customer pays in order to receive service." *Peck v. Cingular Wireless, LLC*, Pet. App. 145a. That fits comfortably into most definitions of "rate," including the definition in the OED, and is certainly "a permissible usage of the term," as the *Peck* court concluded. *Id.* In *Peck* and a more recent decision also involving wireless line item charges, *Hesse v. Sprint Spectrum, L.P.*, the district court judges cited *Black's Law Dictionary* (8th ed. 2004), which, like the OED, defines "rate" as "an amount paid or charged for a good or service." Plainly, a charge made by means of a line item falls into that definition. Therefore, the FCC permissibly concluded that prohibiting line items regulates the rates charged by wireless carriers, and the Eleventh Circuit erred by holding that Congress unambiguously preserved the ability of states and localities to ban line items.

As with its definitional analysis, the Eleventh Circuit was just wrong in saying repeatedly that laws prohibiting line items merely affect "presentation" on wireless bills. *See, e.g.*, Pet. App. 26a. If carriers respond to such laws by continuing to offer national rate plans, then the laws will affect the amounts particular subscribers pay for service, not just the presentation of those charges. As noted above, a likely response by carriers will be to raise monthly charges generally to cover different state and local taxes. For example, if a variety of states and localities impose taxes and fees varying widely, but averaging $5, a carrier barred from using line items in some jurisdictions might reasonably raise its monthly rate from $40 to $45 for a particular plan. That would mean that a subscriber in a jurisdiction with no taxes

and fees would suffer a $5 rate increase. Thus, subscribers in low-tax jurisdictions will pay more than they would if line items are permitted.[4] The alternative – which is highly impractical, particularly for city and county taxes – is to charge different amounts for the same service in different jurisdictions, and the FCC already has concluded that such a result would conflict with Congress's goal in adopting section 332(c)(3)(A) because it "would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans." Pet. App. 75a.

The Eleventh Circuit also erred by suggesting that upholding the Commission's decision renders the phrase "other terms and conditions" in section 332(c)(3)(A) a dead letter. The Commission expressly stated that it was not preempting disclosure requirements. *See* Pet. App. 72a. Any state or local rule that truly affected only the *presentation* of rates – such as requirements that rates be disclosed in bold or in a particular font size or with particular descriptions – would not be preempted by the FCC decision at issue. In addition to rules governing presentation, a variety of other state laws that regulate "other terms and conditions" would be permissible. The FCC's decision invalidates only those laws that directly affect the charges wireless carriers make.

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[4] As the Second Circuit recognized, without the ability to pass through a state gross receipts tax only to subscribers in that state, "states would have an incentive to target telecommunications companies as sources of revenue, with the bulk of the tax incidence ultimately falling on out-of-state residents through nationwide averaging." *Conn. Office of Consumer Counsel v. FCC*, 915 F.2d 75, 79 (2d Cir. 1990) (pass through of gross receipts tax to customers as a surcharge did not violate the Communications Act, 47 U.S.C. § 201(b) or § 202(a)). The court warned that to disallow the surcharge would cause "an upward-spiraling of interstate telephone rates to a level bearing no relation to actual costs of service." *Id.*

In that connection, the Eleventh Circuit erred by failing to understand the FCC's distinction between the *direct* effect on rates of laws prohibiting line items and the *indirect* effect on rates of laws requiring carriers to make universal service contributions. As an initial matter, it is not clear why the court addressed this issue in resolving the case at the first step of the *Chevron* analysis, since the FCC's allegedly inconsistent application of a provision is an issue that should arise with respect to analysis of the reasonableness of the Commission's decision rather than with respect to the allegedly unambiguous meaning of the statute. In any event, there are two separate reasons why there is no merit to the court's contention that it makes little sense to conclude that states may require carriers to make universal service contributions but may not prohibit carriers from recovering them by means of line items. First, the Commission explained in its Order "that section 254(f) of the Act authorizes states to require CMRS providers to contribute to state universal service support mechanisms." Pet. App. 70a. As the more specific provision, section 254(f) should prevail even though universal service contribution requirements may be a form of rate regulation. *See CTIA*, 168 F.3d at 1336.

Second, a requirement that carriers make universal service payments does not *directly* affect rates, as the FCC also stated. Pet. App. 70-71a. A carrier is not required to pass such costs through to its subscribers, and at least in some cases a carrier may choose not to pass some costs through to subscribers.[5] In contrast, a rule prohibiting the

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[5] In *Wireless Consumers Alliance*, 15 F.C.C.R. 17021, ¶ 23 (2000), the Commission concluded that a carrier might respond to a judgment awarding damages because it had falsely advertised its rates by ceasing to advertise falsely, rather than raising its rates.

use of line items directly affects the charges carriers require their subscribers to pay. A rule prohibiting the use of a line item to collect a $3 tax, for example, effectively reduces the amount of that line item to $0. Of course, a carrier may choose to raise other rate elements, such as its monthly fee, to make up for that reduction in the line item. But as shown above, that either will affect the amounts that particular subscribers pay or undermine Congress's decision to permit carriers to offer national or regional rate plans. In short, a prohibition on line items directly involves the carrier-subscriber relationship. In contrast, a requirement that wireless carriers make universal service contributions directly affects the state-carrier relationship and only indirectly affects the rates carriers charge subscribers.

In addition, as discussed below, the court erred by concluding that section 332(c)(3)(A) "preserved" state regulation of "other terms and conditions" of wireless service and by relying on the presumption against preemption. Each of those errors contributed to the Eleventh Circuit's conclusion that section 332(c)(3)(A) unambiguously permits states to ban line items. The statute does not precisely address the issue and the FCC's construction of the statute was entirely reasonable.

The recent district court decisions from the Western District of Washington – *Peck* and *Hesse* – illustrate that the Eleventh Circuit erred. Both cases involve RCW 82.04.500 (2006), which imposes a business and occupation tax surcharge that the state legislature indicated is not to be passed through to consumers by means of line items. In both cases, subscribers sued wireless carriers challenging their use of line items to collect the tax, and two different district court judges rejected the challenges, relying on the FCC Order at issue in this case.

The district court in *Peck* initially deferred to the FCC's decision, concluding that "[t]he FCC's interpretation of 'rates' meets the second prong of the *Chevron* test because it is a permissible usage of the term," after noting that the mandate had not issued from the Eleventh Circuit. Pet. App. 145a. The court subsequently issued an order denying reconsideration, stating that the fact that the Eleventh Circuit's mandate had not issued "was immaterial to the Court's prior ruling" because "the Court finds that Plaintiff's claims are preempted by 47 U.S.C. § 332(c)(3)(A)." Pet. App. 150a. In *Hesse*, the district court deferred to the FCC's interpretation of the provision even though the agency's decision had been vacated. Pet. App. 153a. Neither court invoked the presumption against preemption nor concluded that Congress had unambiguously preserved state regulation of "other terms and conditions" of wireless service.

II. FURTHER REVIEW IS WARRANTED.

This Court should grant the petition for three reasons. First, the Eleventh Circuit's erroneous decision already is harming wireless carriers and their subscribers. Second, that court's flawed construction of the Communications Act threatens to hamper the FCC's ability to eliminate excessive regulation, which will further harm wireless carriers and their subscribers. Third, the court's reliance on the presumption against preemption conflicts with decisions of this Court and other courts of appeals.

A. *The Eleventh Circuit's Erroneous Decision Harms Wireless Carriers and Their Subscribers.*

As already discussed, the Eleventh Circuit's decision will encourage states, counties, and cities to enact and hide taxes on wireless service. There is no sound public policy basis to encourage that result. Wireless carriers are likely to respond to prohibitions on using line items by raising their monthly

rates nationwide to recover the increased costs, which will reward high-tax jurisdictions by permitting them to effectively export some taxes – another bad policy result. If wireless carriers instead respond by adopting separate rate plans for different taxing jurisdictions, that will harm consumers by making it more difficult for them to compare the rates charged by different carriers. In short, the Eleventh Circuit's decision already is harming wireless carriers and their subscribers.

Although the decision in *Peck* is on review in the Ninth Circuit, it does not make sense to wait to see if a conflict in the circuits develops. The appellant in *Peck* has argued that the FCC's Order is not entitled to *Chevron* deference because it has been vacated by the Eleventh Circuit, and it is not clear whether the Ninth Circuit nevertheless will defer to the FCC's decision. Although the wireless carrier might prevail in *Peck* even without the benefit of deference to the FCC's decision, that is not certain because the statute is ambiguous. Therefore, it makes sense for the Court to grant review in this case because *Peck* either will involve the preliminary question whether a vacated FCC decision is entitled to *Chevron* deference or will be decided without respect to deference issues. This case, in contrast, squarely presents the questions whether the FCC permissibly construed section 332(c)(3)(A) under *Chevron* and whether the *Chevron* analysis is affected by the presumption against preemption. Because the scheme for judicial review of FCC decisions established in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, centralizes review in one court of appeals, it may be that those issues will not be presented squarely in any future case.

However, the fact that two district court judges agreed with the FCC's interpretation of the statute, notwithstanding the Eleventh Circuit's contrary determination, further calls into question the Eleventh Circuit's decision that Congress

unambiguously decided that state and local regulation of line items is permissible.

B. *The Eleventh Circuit's Decision Interferes With Congress's Goal of Eliminating Unnecessary Regulation.*

Because "[n]o state lines divide the radio waves," Congress has long recognized that "national regulation is . . . essential to the efficient use of radio facilities." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). Wireless service, of course, uses the radio spectrum. Through a number of enactments, Congress has specifically encouraged the development of wireless competition on a national basis by centralizing regulatory authority in the FCC and ordering it to deregulate wireless service as competition developed.

In 1993, Congress amended the Communications Act to underscore the need for a federal regulatory framework governing the developing wireless industry. In particular, it excepted section 332, which governs "mobile services," from section 2(b) of the Act, 47 U.S.C. § 152(b), which divides wireline telecommunications regulation into interstate and intrastate spheres. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). By doing so, Congress eliminated the traditional limitation on federal authority over intrastate communication services insofar as they relate to the provision of wireless service. *See also* Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 Fed. Comm. L.J. 547 (1998).

Congress simultaneously enacted section 332(c)(1) of the Act, which limits the extent to which the Commission's authority to regulate wireless service should be exercised. 47 U.S.C. § 332(c)(1). More specifically, Congress provided

that the FCC could decide which of the more than 20 statutory provisions governing common carriers ought to apply to wireless carriers. In making that decision, Congress directed the FCC to consider whether, in light of the state of competition, regulation was necessary to ensure that rates are "just and reasonable," whether enforcement of each provision was "necessary for the protection of consumers," and whether the "public interest" favored enforcement or forbearance. Congress later used section 332(c)(1) as the model for section 10 of the Communications Act, 47 U.S.C. § 160, which directs the Commission to forbear from enforcement of any statutory provision or regulation applying to any common carrier when competition renders regulation unnecessary. Section 10(e) prohibits states from enforcing provisions of the Communications Act after the FCC has decided to forbear from enforcement of the provision.

The wireless industry is intensely competitive, and far more competitive than it was in 1993. The most recent annual competition report from the FCC indicates that 94% of Americans live in counties served by four or more wireless carriers. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 21 F.C.C.R. 10947, ¶ 41 (2006). In contrast, in 1993 licenses had been issued to only two carriers in any market and the Department of Justice and the FCC agreed that there was little competition between the cellular duopolists. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, ¶ 65 (1995). The number of wireless subscribers has grown from 10 million to more than 200 million in that period and, therefore, under the plan Congress adopted regulation should be decreasing rather than increasing. As a general matter, in petitioners' view, the FCC should adopt whatever regulations are warranted and provide that additional state and local regulations that do not apply to companies in other competitive industries are preempted.

That is what happened in this case. In the first portion of its decision, which wireless carriers did not challenge, the FCC applied its truth-in-billing principles to wireless carriers to ensure that line items on wireless bills would be clear and non-misleading. Pet. App. 52a.[6]

The Eleventh Circuit's decision threatens to limit the FCC's ability to implement the deregulatory scheme Congress adopted. A court that used the presumption against preemption to guide its analysis and concluded that Congress "unambiguously preserved" state regulation of "other terms and conditions" of wireless service, Pet. App. 25a, including the ability to prohibit line items, is likely to conclude that Congress unambiguously preserved state and local regulation of all sorts of matters.

Contrary to the Eleventh Circuit's statements regarding "other terms and conditions," *id.* at 23a, section 332(c)(3)(A) does not *preserve* anything. Section 332(c)(3)(A) merely provides that by preempting state regulation of rates and entry in 1993, Congress did not intend to preempt regulation of other terms and conditions. The provision, entitled "State Preemption," first bars states from regulating "the entry of or the rates charged by any commercial mobile service" and then adds that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." That is not the language of preservation. Congress would have preserved a state role by stating that

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[6] In the further notice of proposed rulemaking attached to the FCC Order on review, the FCC tentatively concluded that it could adopt additional specific "truth-in-billing" rules and preempt state and local regulations. Pet. App. 92-93a (¶ 53). Wireless carriers, including petitioners, have urged the FCC to take a similar course with respect to any "point of sale" disclosures it might adopt. *See* Pet. App. 95-96a (¶ 55) *et seq.*

nothing *in the Act* authorizes preemption. That is the language of section 332(c)(7), which was adopted contemporaneously with section 332(c)(3)(A). Section 332(c)(7), entitled "Preservation of Local Zoning Authority," states that "nothing in this Act" shall limit state or local authority over certain decisions relating to the placement of wireless towers. 47 U.S.C. § 332(c)(7). By choosing not to preserve state regulation of "other terms and conditions," Congress did not interfere with the FCC's ability to preempt state and local regulation in the course of exercising its broad authority over wireless service. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

Any FCC preemption decision could be challenged in the Eleventh Circuit. *See* 47 U.S.C. § 402(a) (permitting judicial review of FCC orders other than those listed in 47 U.S.C. § 402(b) in any federal court of appeals other than the Federal Circuit). In addition, the Eleventh Circuit held in the decision at issue that the National Association of State Utility Consumer Advocates ("NASUCA") has standing to challenge FCC orders as a consumer of wireless service. Pet. App. 3a. NASUCA is likely to challenge any FCC preemption decision in that court. Accordingly, the Eleventh Circuit's decision in this case is likely to interfere significantly with the FCC's ability to adopt one set of national rules governing wireless service.

C. *The Eleventh Circuit's Reliance on the Presumption Against Preemption Is Contrary to Decisions of This Court and Other Courts of Appeals.*

The Eleventh Circuit preceded its conclusion that Congress "unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills" with the statement that the presumption against preemption

"guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'" Pet. App. 25a, 23a. It seems clear that the court's reliance on the presumption led it to erroneously conclude that Congress had spoken precisely to the issue of line items when in fact, as the D.C. Circuit concluded in *CTIA*, 168 F.3d at 1336, section 332(c)(3)(A) does not define its terms and is far from clear with respect to the line between rate regulation and regulations of other terms and conditions of wireless service.

Citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996), the Eleventh Circuit stated that the presumption against preemption does not "trump" *Chevron*, but instead "guides" the court's analysis. In fact, however, this Court made clear in *Smiley* that the presumption plays no role in a case like this. The issue in *Smiley* was whether the Comptroller of the Currency had permissibly concluded that "interest" in 12 U.S.C. § 85 includes late fees. The Court assumed without deciding that the presumption against preemption might play a role when the issue was whether a statute was preemptive. But when, as in *Smiley*, the issue was "simply the meaning of a provision," the Court held that the presumption plays no role – even though the broader the meaning of "interest," the broader the scope of preemption. 517 U.S. at 744. So too here. Section 332(c)(3)(A) is plainly preemptive and the issue is simply whether "rates charged" includes line items. The presumption against preemption plays no role under *Smiley* – neither to "trump" *Chevron* nor to "guide" the court to a conclusion it would not otherwise reach. Similarly, in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 18 (2002), the Court declined to invoke the presumption against preemption when the issue was "whether Congress has given FERC the power to act as it has."

In *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), the Sixth Circuit followed those decisions. It declined to invoke the presumption against preemption to consider whether the Comptroller of the Currency had erred by preempting Michigan laws regulating mortgage companies that are subsidiaries of national banks. The court "decline[d] Michigan's invitation to frame the issue as whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's," as would have been appropriate if the presumption applied, and instead analyzed the issue "through the framework established by *Chevron*." *Id.* at 560. This Court granted the petition for a writ of certiorari filed by the Commissioner of the Michigan Office of Insurance and Financial Services claiming that the Comptroller's decision is not entitled to deference under *Chevron*. In her brief, the Commissioner argued that giving effect to the Comptroller's regulations would conflict with the presumption against preemption. Pet. Br. in No. 05-1342 at 25-26.

If this Court again concludes that the presumption against preemption does not affect the analysis under *Chevron*, it may be appropriate to grant this petition, vacate the Eleventh Circuit's judgment, and remand for further proceedings in light of its opinion. If the Court does not reach the issue of the relationship between the presumption and *Chevron*, it should grant the petition. As the grant in *Watters v. Wachovia* shows, the issue is a recurring one that affects a broad range of federal actions and warrants this Court's attention. Moreover, the Eleventh Circuit's invocation of the presumption against preemption conflicts with the Sixth Circuit's judgment in *Watters*, as well as this Court's decision in *Smiley*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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February 27, 2007

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

SPRINT NEXTEL CORPORATION AND
T-MOBILE USA, INC.
Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NOS. 05-11682 AND 05-12601

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, PETITIONER

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, INTERVENOR-PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT

AT&T CORPORATION,
CINGULAR WIRELESS, INC.,
LEAP WIRELESS INTERNATIONAL, INC.,
NEXTEL COMMUNICATIONS, INC.,
SPRINT CORPORATION,
T-MOBILE USA, INC.,
VERIZON,
CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, INTERVENORS-RESPONDENTS

VERMONT PUBLIC SERVICE BOARD, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT

July 31, 2006, Filed

Petitions for Review of Decisions of the Federal Communications Commission.

Before: BLACK, PRYOR and COX, Circuit Judges.

PRYOR, Circuit Judge.

OPINION

The key issue presented in this petition for review is whether the Federal Communications Commission exceeded its authority, under section 332(c)(3)(A) of the Communications Act of 1934, when it issued an order that preempted the states from requiring or prohibiting the use of line items in customer billing for cellular wireless services. 47 U.S.C. § 332(c)(3)(A); *see Truth-in-Billing and Billing Format, Nat'l Ass'n of State Util. Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 20 F.C.C.R. 6448 (2005) [hereinafter "Second Report and Order" or "the Order"]. The Commission argues, on the one hand, that the regulation of line-item billing involves "rates charged" for cellular wireless services, which is the exclusive province of federal regulation. 47 U.S.C. § 332(c)(3)(A). Representatives of state interests argue, on the other hand, that the regulation of line-item billing involves "other terms and conditions" of cellular wireless services, which are regulable by the states. *Id.*

This appeal also addresses three threshold issues: (1) whether, under the Hobbs Act, 28 U.S.C. § 2344, this Court lacks subject matter jurisdiction to review the petition filed by the Vermont Public Service Board (the Vermont Board); (2) whether the National Association of Regulatory Utility Commissioners (the State Utility Regulators) may participate as an intervenor; and (3) whether the National Association of

State Utility Consumer Advocates (the State Consumer Advocates) has standing to petition for review. As to the threshold issues, we dismiss the petition of the Vermont Board because it is not a "party aggrieved" by the Second Report and Order, but we allow the State Utility Regulators to continue as an intervenor and deny the motion to dismiss the petition of the State Consumer Advocates, which have standing as a consumer of wireless service.

On the key issue, we grant the petitions for review because we conclude that the Commission exceeded its authority when it preempted the states from requiring or prohibiting the use of line items. The scope of federal authority to regulate "rates" or "entry" does not include the presentation of line items on cellular wireless bills. 47 U.S.C. § 332(c)(3)(A). This billing practice is a matter of "other terms and conditions" that Congress intended to be regulable by the states. *Id.*

I. BACKGROUND

The State Consumer Advocates filed a petition with the Commission that requested a prohibition on the use of line items by cellular wireless carriers unless the line item is mandated by state or federal law. In response to this petition, the Commission issued an order that amended the Truth-in-Billing Rules of the Commission, preempted the states from requiring or prohibiting the use of line items in customer billing for wireless service, and proposed further rulemaking to preempt the states from the regulation of billing practices of wireless service providers. The State Consumer Advocates and the Vermont Board petition for review of the Order by the Commission. Sprint Nextel Corp. and Cingular Wireless LLC (collectively, the Carriers) intervene in support of the Commission, and the State Utility Regulators intervene in support of the Vermont Board.

To explain the context of this appeal, we address three

preliminary matters. We first describe the enactment and amendment of the Communications Act and the promulgation of the Truth-in-Billing Rules. We next discuss the petition for declaratory ruling filed by the State Consumer Advocates and the Second Report and Order issued by the Commission in response to that petition. We then discuss motions filed by the Carriers and the Commission to dismiss the petitions of the Vermont Board and the State Consumer Advocates.

A. The Communications Act of 1934 and the Truth-in-Billing Rules

The Communications Act of 1934, 47 U.S.C. §§ 151 to 615b, was enacted "for the purpose of regulating interstate and foreign commerce in communication by wire and radio." *Id.* § 151. The Act vested the Commission with the authority to regulate radio frequencies used in wireless services. *Id.* § 303. In 1993, Congress amended the Communications Act to create a new regulatory class called "commercial mobile radio service," which is "any mobile service [] that is provided for profit and makes interconnected service available [] to the public or [] to such classes of eligible users as to be effectively available to a substantial portion of the public." *Id.* § 332(d)(1). The amendment granted the federal government exclusive authority to regulate the "rates charged" and "entry" of wireless carriers. *See id.* § 332(c)(3)(A). Although the states were prohibited from regulating "rates" or "entry," the amendment provided that the states could continue to regulate "other terms and conditions" of wireless service. *Id.* § 332(c)(3)(A).

In May 1999, in response to a growing concern with consumer fraud in the provision of telecommunications services, the Commission promulgated the Truth-in-Billing Rules. *In the Matter of Truth-in-Billing and Billing Format*, 14 F.C.C.R. 7492 (1999) [hereinafter "First Report and

Order"]. The stated purpose of the Rules was "to ensure that consumers are provided with basic information they need to make informed choices in a competitive telecommunications marketplace, while at the same time protecting themselves from unscrupulous competitors." *Id.* at 7493–94. The Truth-in-Billing Rules required consumer telephone bills to (1) "be clearly organized, clearly identify the service provider, and highlight any new providers"; (2) "contain full and non-misleading descriptions of charges"; and (3) "contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges, on the bill." *Id.* at 7496 ¶ 5.

The Commission exempted wireless service providers from several of these rules, *id.* at 7501–02 ¶¶ 13–19, but the Commission required, among other things, "(1) that the name of the service provider associated with each charge be clearly identified on the bill; and (2) that each bill should prominently display a telephone number that customers may call free-of-charge in order to inquire or dispute any charge contained on the bill." *Id.* at 7502 ¶ 15. The Commission sought further comment on whether the Truth-in-Billing Rules should be applied to wireless service providers. *Id.* at 7535 ¶ 68.

B. The State Consumer Advocates and the Second Report and Order

The State Consumer Advocates "are state agencies designated by laws of their respective jurisdictions to represent the interests of utility consumers before regulatory agencies and in the courts." The State Consumer Advocates petitioned the Commission for a declaratory ruling that prohibited wireless telecommunications carriers "from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state or local law." *Second Report and Order*, 20 F.C.C.R. at 6449 ¶

1. A line item is "a discrete charge identified separately on an end user's bill." *Id.* at 6462 ¶ 30. According to the State Consumer Advocates, the use of line items that were not required by federal or state law violated the Truth-in-Billing Rules and the Communications Act because these line items "do not allow customers to accurately assess what they are being billed for or permit customers to determine whether the amounts charged conform to the price charged for service." *Id.* at 6454 ¶ 13 n.32.

In response to the request for a declaratory ruling filed by the State Consumer Advocates, the Commission issued a notice that solicited comments regarding the petition. The notice stated that the Commission "seeks comment," about whether telecommunications carriers should be prohibited from "imposing monthly line-item charges, surcharges or other fees on customers bills unless such charges have been expressly mandated by a regulated agency." *Nat'l Ass'n of State Util. Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, 19 F.C.C.R. 9541 (2004) (public notice). Comments were submitted by wireless carriers, the State Utility Regulators, the State Consumer Advocates, and individual consumers. Many consumers submitted brief comments that expressed confusion and dissatisfaction with their monthly telephone bills.

After the public comment period closed, during the so-called "permit but disclose" proceedings, *see* 47 C.F.R. § 1.1206, the Commission received ex parte presentations and letters. On March 3, 2005, the State Utility Regulators provided notice of oral and written ex parte communications with the members of the Commission. Also on March 3, the Vermont Board sent an ex parte letter addressed to the five members of the Commission. On March 4, the permit-but-disclose period closed, and communications with the Commission were no longer permitted. *See id.* § 1.1203. On that date, the Vermont Board electronically filed notice of the

ex parte letter it had sent on March 3, but the Clerk of the Commission excluded the letter because it "was received during the Sunshine Agenda period, and is associated with, but not made part of the record."

On March 18, 2005, the Commission issued its conclusions in an Order that addressed three issues. First, in a "Second Report and Order," the Commission amended or clarified the Truth-in-Billing Rules and applied these rules to wireless service providers. *Second Report and Order*, 20 F.C.C.R. at 6454–58 ¶¶ 14–20. Second, in a "Declaratory Ruling," the Commission denied the petition filed by the State Consumer Advocates and preempted the states from requiring or prohibiting the use of line items on monthly telephone bills by wireless service providers. *Id.* at 6458–6467 ¶¶ 21–36. Third, the Commission requested a "Second Further Notice of Proposed Rulemaking" that proposed to adopt new rules in the billing practices of wireless service providers. *Id.* at 6467–6478 ¶¶ 37–57.

As to the first issue, the Commission reviewed the history of the Truth-in-Billing Rules and concluded "that [wireless service providers] should no longer be exempt from [the] requirement that billing descriptions be brief, clear, non-misleading and in plain language." *Id.* at 6456 ¶ 16; *see also* 47 C.F.R. § 64.2401(b). The Commission found that "the increasing number of consumer complaints to this Commission and state regulatory agencies regarding wireless billing practices provides empirical evidence that application of the truth-in-billing rules to [wireless service providers] is necessary and in the public interest." *Second Report and Order*, 20 F.C.C.R. at 6457 ¶ 18. The Commission "emphasize[d]" that the application of the truth-in-billing rules to wireless service providers did not "limit[] states' authority to enforce their own generally applicable consumer protection laws, to the extent such laws do not require or prohibit use of line items." *Id.* at 6458 ¶ 20.

As to the second issue, the Commission denied the petition filed by the State Consumer Advocates because "nothing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items." *Id.* at 6458–59 ¶ 23. Although the Commission found that consumers and state regulatory agencies were confused about the use of line items, the Commission "recognize[d] that overbroad state regulations . . . may frustrate our federal rules and the federal objective of minimizing regulatory burdens on the competitive [wireless service provider] industry." *Id.* at 6459–60 ¶ 24. The Commission stated that "it is permissible for carriers to recover [regulatory] costs so long as they do so in a manner that complies" with the Truth-in-Billing Rules, but "it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge." *Id.* at 6460–61 ¶¶ 26–27.

The Commission also concluded that "state regulations requiring or prohibiting the use of line items . . . constitute rate regulation and . . . are preempted under section 332(c)(3)(A)" of the Act. *Id.* at 6462 ¶ 30. The Commission explained that "rates," included "rate levels," "rate structures," and "rate elements." *Id.* at 6462–63 ¶ 30. After describing line items as a "rate element," the Commission reasoned that the prohibition or requirement of line items "directly affect[s] the manner in which the [wireless service provider] structures its rates." *Id.* at 6463 ¶¶ 30–31.

The Commission distinguished the ability of the states to mandate or prohibit line items from the ability to impose taxes, state universal service support charges, and other disclosure laws, which the Commission left undisturbed. *Id.* at 6464–65 ¶¶ 32–33. The Commission explained that "requiring or prohibiting the use of line items" has a "direct

effect" on the ability of wireless service providers to structure rates, but other state regulations have an "indirect effect . . . on a company's behavior." *Id.* at 6466 ¶ 34 (quoting *Wireless Consumers Alliance Order,* 15 F.C.C.R. 17,021, 17,034 ¶ 23 (2000)). The Commission stated that it "may not always be clear" whether line item regulation is preempted by section 332(c)(3)(A), and it was necessary to look to the "substance, [and] not merely the form of the line item." *Id.*

The Commission premised its decision to preempt state regulation on "the pro-competitive, deregulatory framework for [wireless service providers] prescribed by Congress." *Id.* at 6466 ¶ 35. The Commission stated, "Congress has directed that the rate relationships between [wireless service] providers and their customers be governed 'by the mechanisms of the competitive marketplace.'" *Id.* (quoting *Wireless Consumers Alliance Order,* 15 F.C.C.R. at 17,032–33 ¶¶ 20–21)). Because wireless service providers "have come to structure their offerings on a national or regional basis," state laws that prohibit or require the use of line items would result in a "patchwork of inconsistent rules" that "conflict[s] with federal policies." *Id.*

As to the third issue, the Commission solicited comments about "the role of states in regulating billing" and "other truth-in-billing issues." *Id.* at 6468 ¶ 37. The Commission sought comments about whether other state regulation of billing practices was preempted by the Communications Act. *Id.* at 6474 ¶ 50. The Commission explained that "limiting state regulation of . . . billing practices [by wireless service providers] . . . will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers." *Id.* at 6475 ¶ 52.

The State Consumer Advocates and the Vermont Board filed petitions for review of the Order. The State Utility

Regulators intervened in support of the Vermont Board. Sprint Nextel and Cingular Wireless, public corporations that provide cellular wireless services, intervened in support of the Commission.

C. Motions Filed After the Petition for Review

After the State Consumer Advocates and the Vermont Board petitioned for review of the Order, the Commission moved to dismiss both the petitions of the State Consumer Advocates and the Vermont Board. The Commission argued that the State Consumer Advocates lacked standing to petition for review on behalf of its members because the State Consumer Advocates failed to establish that "at least one of its members meets the minimal Article III prerequisites for standing to sue." The Commission contended that we lacked subject matter jurisdiction to consider the petition of the Vermont Board because it was not a party to the agency proceedings under the Hobbs Act. 28 U.S.C. § 2344. The Carriers supported the motion to dismiss of the Commission.

The Vermont Board responded that it was a "party aggrieved" because it had participated in the proceedings, 28 U.S.C. § 2344, or alternatively, was a party because the Commission "expressly subjected the [the Vermont Board] to its Order." First, the Vermont Board argued that it had participated in the Commission proceedings because it both submitted comments in the first Truth-in-Billing Order, which had the same agency docket number, and sent an ex parte letter to the Commissioners on March 3 that was deemed untimely by the Clerk of the Commission. The Vermont Board moved to correct the administrative record by including the ex parte letter. Second, the Vermont Board argued that even if it had failed to participate in the agency proceedings, it could petition for review because it was "directly bound" by the Order.

The State Consumer Advocates responded that their

association has standing to challenge the Order either on behalf of its members or as a consumer of wireless service. The State Consumer Advocates argued that they have associational standing because the members of the State Consumer Advocates are charged by state statutes "to advocate on behalf of consumers." In support of this argument, the State Consumer Advocates submitted affidavits from three individual members of the State Consumer Advocates who are consumers of wireless telecommunications service. The affidavits stated that the preemption Order "will make it difficult to enact . . . new state laws . . . that are necessary to protect wireless customers from unreasonable, misleading, deceptive or illegal line item fees and charges." The State Consumer Advocates attached the affidavit of John Perkins, the President of the State Consumer Advocates, who testified, "NASUCA is itself a consumer of telephone services . . . . All of the monthly bills for service received by [the State Consumer Advocates] contain line items."

In response to these arguments, the Commission moved to withdraw the motion to dismiss the State Consumer Advocates, but continued to move for dismissal of the Vermont Board. The Carriers then submitted their own motion to dismiss the petition of the State Consumer Advocates on the same grounds the Commission had argued in its withdrawn motion. We granted the motion by the Commission to withdraw its motion to dismiss the petition of the State Consumer Advocates, and we ordered that the motions to dismiss the petitions of the State Consumer Advocates and the Vermont Board be carried with the case. The motion of the Vermont Board to correct the administrative record was also carried with the case.

II. STANDARD OF REVIEW

We review our subject matter jurisdiction *de novo.*

Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001). We review whether a party has standing to challenge an order *de novo*. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir.), *cert. denied*, ___ U.S. ___, 126 S. Ct. 377 (2005). We review the authority of the Commission to regulate under the Communications Act based on the standard enunciated in *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781 (1984).

III. DISCUSSION

Before we address the petitions for review, we must consider issues about our jurisdiction. We first address whether the Vermont Board is a "party aggrieved" by the Order under the Hobbs Act. 27 U.S.C. § 2344. Because we conclude that the Vermont Board is not a party aggrieved, we next consider whether the State Utility Regulators may continue as intervenors. We then address whether the State Consumer Advocates have standing to petition for review of the Order. After we conclude that the State Consumer Advocates and the State Utility Regulators have standing, we then turn to the merits of the petitions for review: whether section 322(c)(3)(A) expressly preempted the ability of the states to require or prohibit the use of line items by wireless service providers.

A. The Vermont Board Is Not a "Party Aggrieved" Under the Hobbs Act.

The Communications Act provides, "Any proceeding to enjoin, set aside, annul, or suspend any order of the [Commission] . . . shall be brought as provided by and in the manner prescribed in" the Hobbs Act. 47 U.S.C. § 407(a). The Hobbs Act vests exclusive jurisdiction in the courts of appeals to "determine the validity of [] all final orders of the [Commission]." 28 U.S.C. § 2342. "Any party aggrieved by the final order may . . . file a petition to review the order . . .

." *Id.* § 2344. "A 'party aggrieved' is one who participated in the agency proceeding." *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002). A nonparty to the proceeding of the Commission must file a petition for reconsideration as a condition precedent to judicial review of the Order. 47 U.S.C. § 405(a).

The Vermont Board presents three arguments that it is a "party aggrieved" by the Order. 28 U.S.C. § 2344. First, the Vermont Board contends that, because it participated in the First Report and Order, which shares the same docket number as the Second Report and Order, it has participated in the proceedings. Second, the Vermont Board argues that it is a "party aggrieved" because it submitted an ex parte letter to the members of the Commission, which the Vermont Board alleges was erroneously excluded from the administrative record. As part of this argument, the Vermont Board moves to correct the administrative record by including the ex parte communication. Third, the Vermont Board argues that even if it did not participate in the proceedings, it may challenge the Order because it is subject to the Order and its arguments challenge the authority of the Commission. We address each argument in turn and conclude that each argument fails.

1. Participation in the First Report and Order Does Not Render the Vermont Board a "Party Aggrieved."

The Vermont Board argues that the comments it submitted in the proceedings for the First Report and Order confer party status on it to petition for review. Because the docket number for the First Report and Order, Docket No. 98-170, is the same as the Second Report and Order, the Vermont Board argues that it is a "party aggrieved" under the Hobbs Act. We disagree.

The reliance by the Vermont Board on the docket number to argue that it is a "party aggrieved" by the Second Report

and Order is misplaced. Under the Hobbs Act, "[a]ny party aggrieved *by the final order*" may petition for review. 28 U.S.C. § 2344. Although the First and Second Orders and Report share the same docket number, the Hobbs Act confers party status on those who participated in proceedings that led to the Order under review. *See Ala. Power Co.*, 311 F.3d at 1366.

The Vermont Board is not a "party aggrieved by the final order" because the Vermont Board petitions for review of the Second Report and Order. 28 U.S.C. § 2344. Regardless of the docket number assigned to the proceeding, the Vermont Board had to be a participant in the proceedings that led to the Second Report and Order to be a "party aggrieved." *Id.* The comments that the Vermont Board submitted in the proceedings that led to the First Report and Order are immaterial: those comments make the Vermont Board a "party aggrieved by" the First Report and Order, but they do not make the Vermont Board a "party aggrieved by" the Second Report and Order. *Id.*; *see Simmons v. ICC*, 716 F.2d 40, 45 (D.C. Cir. 1983) (stating that the petitioner was not a "party aggrieved" where the petitioner participated in a proceeding that was "procedurally and substantially independent" from the challenged order).

2. The Ex Parte Letter Submitted by the Vermont Board Failed to Comply with Regulations Issued by the Commission.

The Vermont Board also contends that it participated in the Commission proceeding because it submitted an ex parte letter that it asserts was erroneously excluded from the administrative record. The Commission did not include the letter in the administrative record because the Vermont Board electronically submitted notice of the letter during the "Sunshine" period when no communication was allowed with the Commissioners. *See* 47 C.F.R. 1.1203(a). The Vermont

Board moves to correct the administrative record by including the letter. We address the motion filed by the Vermont Board before we consider whether the ex parte letter is sufficient to confer the Vermont Board with party status.

We have discretion to correct the administrative record to "supply any omission from the record or correct a misstatement." Fed. R. App. P. 16(b). An administrative record consists of "the order sought to be reviewed or enforced, the findings or reports on which it is based, and the pleadings, evidence and proceedings before the agency." Fed. R. App. P. 16(a). We may deny a motion to correct the record where, among other reasons, the proffered item does not fall within the definition of the record, *see Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1324 (D.C. Cir. 1984), the proffered item is immaterial or incomplete, *Ala. Tissue Ctr. of Univ. of Ala. v. Sullivan*, 975 F.2d 373, 376 (7th Cir. 1992), or the agency did not have the opportunity to consider the evidence, *see Altawil v. INS*, 179 F.3d 791, 792 (9th Cir. 1999).

The regulations of the Commission provide that ex parte presentations are allowed during the permit-but-disclose period of the agency proceeding. 47 C.F.R. § 1.1206(a). Ex parte presentations shall be included in the administrative record if the presentation includes a cover letter and "shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that two copies have been submitted to the Secretary, and must be labeled as an ex parte presentation." 47 C.F.R. § 1.1206(b)(1). To be considered, ex parte communications must comply with these provisions. *See id.* § 1.1206(a).

The Vermont Board concedes that its electronic submission on March 4 failed to include a cover letter to explain that it provided notice for the March 3 ex parte letter.

There was no way for the Commission to discern that the letter electronically filed on March 4 disclosed an ex parte communication that timely had been submitted to the five Commissioners. Because the electronic submission failed to identify that it disclosed an ex parte letter submitted on March 3, it is not properly part of the record that the agency should have included. 47 C.F.R. § 1.1206(b)(1) (stating that the cover letter that provides notice "must be labeled as an ex parte presentation"); *see Deukmejian,* 751 F.2d at 1324 ("In discharging their obligation to monitor agency action, courts review a record compiled by the agency and containing its rationale and supporting findings . . . ."). The Commission followed its regulations when it excluded the ex parte letter from the administrative record.

We deny the motion to supplement the record with the ex parte letter. "We must give substantial deference to an agency's interpretation of its own regulations," *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S. Ct. 2381, 1286 (1994), and the Commission was not "arbitrary and capricious" when it excluded the letter from the administrative record, 5 U.S.C. § 706(2)(A). The Vermont Board did not "participate in the proceedings" by submitting the letter. *Ala. Power Co.,* 311 F.3d at 1366.

3. No Exception Exists to Allow the Vermont Board to Petition for Review of the Order.

The Vermont Board alternatively argues that, even if it did not participate in the proceedings, it is a party entitled to petition for review of the Order for two reasons. First, the Vermont Board contends that it is a "party aggrieved" because it is subject to the Order. Second, the Vermont Board argues that "party status is not . . . required when the agency has acted beyond its authority."

The argument that the Vermont Board may petition for review because it is subject to the Order fails because the

Vermont Board misunderstands the scope of our jurisdiction. The Hobbs Act confers the courts of appeals with subject matter jurisdiction to review the orders of administrative agencies. "Since petitioners were never parties to the rulemaking proceedings, this court simply does not have jurisdiction over their claim." *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). The cases cited by the Vermont Board are inapposite because they involve the extension of personal jurisdiction, *Gilchrist v. Gen. Elec. Cap. Corp.*, 262 F.3d 295, 300–01 (4th Cir. 2001), *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 955 (4th Cir. 1999), or the relaxation of prudential standing requirements, *Devlin v. Scardalletti*, 536 U.S. 1, 7–8, 122 S. Ct. 2005, 2009–10 (2002). These cases do not allow a court to expand the statutory grant of subject matter jurisdiction to review an agency decision.

The argument that a petitioner need not be a party when the petitioner challenges the authority of an administrative agency runs contrary to our precedent. We have held that "[a] 'party aggrieved' is one who participated in the agency proceeding." *Ala. Power Co.*, 311 F.3d at 1366. In support of its argument, the Vermont Board cites two decisions from the Fifth Circuit, *see Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984); *Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 84 n.4 (5th Cir. 1982), but we are bound by our decision that a petitioner must be a "party aggrieved" without regard to the type of challenge the petitioner seeks to bring. *Ala. Power Co.*, 311 F.3d at 1366; *cf. Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005) (stating that the exception to party status discussed in *American Trucking Ass'ns* has been "squarely rejected by some of our sister circuits"); *see also Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (concluding that the discussion in *American Trucking Ass'ns* is dictum and *Wales Transportation* erroneously relied on

American Trucking Ass'ns). The Vermont Board is not a "party aggrieved" entitled to petition for review of the Order by the Commission.

We grant the motion by the Commission to dismiss the petition of the Vermont Board. Neither the participation of the Vermont Board in the First Report and Order nor the ex parte letter that was procedurally deficient confer party status on the Vermont Board, and no exception excuses the failure of the Vermont Board to participate in the proceedings of the Commission. We lack jurisdiction to consider the petition filed by the Vermont Board.

B. The State Utility Regulators May Proceed As an Intervenor.

Although we dismiss the Vermont Board, the State Utility Regulators may continue as an intervenor. "Intervention . . . cannot create jurisdiction if none existed before," 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1917, at 457–58 (2d ed. 1986), but we have discretion to "treat intervention as a separate action, especially when the intervenor has an independent basis for jurisdiction," *Atkins v. State Bd. of Educ. of N.C.,* 418 F.2d 874, 875 (4th Cir. 1969) (per curiam); *see* 7C Wright, Miller & Kane, Federal Practice and Procedure § 1917, at 458–59; *see also Fuller v. Volk,* 351 F.2d 323, 328–29 (3d Cir. 1965). Because the State Utility Regulators participated in the proceedings by submitting comments and notice of ex parte communications, the State Utility Regulators have independently established their status as "party aggrieved." 28 U.S.C. § 2344. We exercise our discretion to allow the State Utility Regulators to continue in the petition for review.

C. The State Consumer Advocates Have Standing to Petition for Review.

The Constitution of the United States limits the subject matter jurisdiction of federal courts to "Cases" and

"Controversies." U.S. Const., Art. III § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). The minimum requirements for constitutional standing are "injury in fact," "a causal connection between the injury and the conduct complained of," and that the "injury will be redressed by a favorable decision." *Id.* at 560–61, 112 S. Ct. at 2136. On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* at 561, 112 S. Ct. at 2137.

The Carriers move to dismiss the State Consumer Advocates for failure to establish associational standing. The Carriers contend that the State Consumer Advocates cannot establish that at least one of their members has suffered particularized injury and only the member agencies of the State Consumer Advocates have the authority to petition for review. The State Consumer Advocates argue that we need not address this argument because they have standing on an alternative ground.

The State Consumer Advocates argue that they need not rely on associational standing because they are a consumer of wireless telecommunications services that receives bills. The affidavit submitted by the State Consumer Advocates from the President of their organization stated, "NASUCA is itself a consumer of telephone services, both wireline and wireless. It presently has wireline service with Verizon and AT&T and wireless service with Verizon Wireless. All of the monthly bills for service received by NASUCA contain line items."

The State Consumer Advocates have established "general factual allegations of injury resulting from the defendant's conduct." *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136. The State Consumer Advocates contend that, because the preemption of the Commission affects the ability of the states

to regulate the disclosure of charges on consumer wireless bills, the Order adversely affects the interests of the State Consumer Advocates as a consumer of wireless service. The complaints of the State Consumer Advocates are redressable by granting the petition and vacating the Order of the Commission. That disposition would allow the states to require or prohibit the use of line items by wireless service providers, which the State Consumer Advocates contend would protect consumers from fraud.

The Carriers argue that the State Consumer Advocates may not rely on their status as a consumer of wireless service as a basis for standing because the State Consumer Advocates "chose not to base [their] right to seek review on [their] own receipt of phone bills" in the petition for review. We disagree. When ruling on motions to dismiss for lack of standing, federal courts may consider affidavits and other factual materials in the record. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 881, 110 S. Ct. 3177, 3185 (1990) (considering affidavits submitted in response to a motion for summary judgment to establish standing); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233, 110 S. Ct. 596, 609 (1990), *overruled in part on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 124 S. Ct. 2219 (2004) ("[S]tanding . . . must affirmatively appear *in the record*." (internal quotations and citations omitted) (emphasis added)). Because the State Consumer Advocates have established standing to petition for review as a consumer of wireless service through the affidavit of their President, we deny the motion by the Carriers. We next turn to the merits of the petitions for review filed by the State Utility Regulators and the State Consumer Advocates.

D. The Commission Exceeded Its Authority When It Preempted State Regulation of Line-Item Billing Under Section 332(c)(3)(A).

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land[,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art VI. "The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986). "[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Id.* at 369, 106 S. Ct. at 1887–88.

"Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Fid. Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 153–54, 102 S. Ct. 3014, 3022–23 (1982) (quoting *United States v. Shimer*, 367 U.S. 374, 381–82, 81 S. Ct. 1554, 1560 (1960)). Where a federal agency preempts state law, "the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power." *New York v. FCC*, 486 U.S. 57, 68, 108 S. Ct. 1637, 1642 (1988). "Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan*, 458 U.S. at 153, 102 S. Ct. at 3022.

Federal law may preempt state law in three ways. First, express "[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law." *La. Pub. Serv. Comm'n*, 476 U.S. at 368, 106 S. Ct. at 1898. Second, conflict preemption occurs "when there is outright or actual conflict between federal and state law." *Id.* Third, field preemption occurs "where compliance with both federal and state law is in effect physically impossible." *Id.* "[T]he categories of preemption are not rigidly distinct . . . field pre-emption may be understood as a species of conflict pre-

emption." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294 (2000); *see* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 262 (2000).

"'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992) (plurality opinion) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185 (1978)). "[A]ny understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86, 116 S. Ct. 2240, 2250 (1996). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305 (1977)). Courts interpret the text of the statute and apply traditional cannons of statutory construction to discern the intent of Congress. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229, 114 S. Ct. 2223, 2231 (1994); *see, e.g., La. Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S. Ct. at 1899.

"When we consider issues that arise under the Supremacy Clause . . . , we start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004). "Although the Constitution makes a few of the federal government's powers exclusive, the states retain concurrent authority over most of the areas in which the federal government can act." Nelson, *supra*, at 225. We accordingly presume that "Congress does not cavalierly pre-empt state[]law." *Medtronic, Inc.*, 518 U.S. at 485, 116 S. Ct. at 2250. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits

no other conclusion, or that the Congress has unmistakably so ordained." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963). Although the presumption against preemption cannot trump our review of the Order under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate "other terms and conditions." *See Smiley v. Citibank, N.A.*, 517 U.S. 735, 743–44, 116 S. Ct. at 1730, 1735 (1996). We apply these principles to determine whether Congress granted the Commission authority to preempt the state regulation of line item billing.

In the Second Report and Order, the Commission preempted state regulation of line-item billing based on the express language of the Communications Act. *See* 20 F.C.C.R. at 6462–63 ¶ 30, 6466 ¶ 35. The Commission concluded that the language of section 332(c)(3)(A) of the Communications Act "'prohibit[s] states from prescribing, setting or fixing rates' of wireless service providers." *Id.* at 6462 ¶ 30 (quoting *Pittencrief Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997)). The Commission explained that "[e]fforts by individual states to regulate [wireless service providers'] rates through line item requirements . . . would be inconsistent with the federal policy of a uniform, national and deregulatory framework" of the Communications Act. *Id.* at 6467 ¶ 35.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron U.S.A.*, 467 U.S. at 842–43, 104 S. Ct. at 2781. First, we consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear. . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* To determine if "Congress has directly spoken to the precise question at issue," *id.*, courts interpret the language of the statute and apply traditional cannons of

statutory construction, *see MCI Telecomms. Corp.*, 512 U.S. at 229, 114 S. Ct. at 2231. "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law[, b]ut the courts are the final authorities on issues of statutory construction." *SEC v. Sloan*, 436 U.S. 103, 118, 98 S. Ct. 1701, 1712 (1978) (internal citations and quotations omitted); *see also Chevron U.S.A.*, 467 U.S. at 842–43, 104 S. Ct. at 2781–82.

Second, "if the statute is silent or ambiguous *with respect to the specific* issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A.*, 437 U.S. at 843, 104 S. Ct. at 2782 (emphasis added). To determine whether a term within a statute is ambiguous, we consider the context in which the term is used. *See MCI Telecomms. Corp.*, 512 U.S. at 226, 114 S. Ct. at 2229 (explaining that *Chevron* deference applied because "contextual indications" created ambiguity in the term "modify"). The interpretation of an ambiguous statute by an administrative agency is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44, 104 S. Ct. at 2782. "Unexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, ___ U.S. ___, 125 S. Ct. 2688, 2699 (June 27, 2005).

The Commission premised the preemption of state regulation of line item billing on the language of section 332(c)(3)(A). That provision states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). The Commission

found that "Congress did not specifically define 'rates,' 'entry,' or other key terms in section 332(c)(3)(A)," but explained that "rate regulation extends to regulation of 'rate levels and 'rate structures' for" wireless service providers. *Second Report and Order*, 20 F.C.C.R. at 6462–63 ¶ 30 (citing *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898, 19,906–07 ¶¶ 18–20(1999)). The Commission reasoned that the "type of state regulations in question reveals that many directly affect [wireless service providers'] rates and rate structures in a manner that amounts to rate regulation." *Id.* at 6463 ¶ 31. We disagree with this reasoning.

The language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills. Although the term "rates charged" is not defined in the Communications Act, the meaning of this term is clear in this context. A straightforward reading of the complementary phrases "regulate entry of or the rates charged" and "other terms and conditions," 47 U.S.C. § 332(c)(3)(A), evidences the "clear and manifest purpose of Congress" to leave the regulation of line items to the states, *Cliff*, 363 F.3d at 1122.

A "rate," as defined by the Oxford English Dictionary, is "[t]he amount of a charge or payment . . . having relation to some other amount or basis of calculation." Oxford English Dictionary (2d ed. 1989). Other dictionaries define a "rate" as "[a]n amount paid or charged for a good or service," Black's Law Dictionary 1268 (7th ed. 1999), or "a charge per unit of a public-service commodity." Merriam-Webster Online Dictionary, *available at* www.mw.com/cgi-bin/dictionary (last visited June 27, 2006). "[A]s a basic rule of statutory interpretation, we read the statute using the normal meanings of its words." *Horton Homes, Inc. v. United States*, 357 F.3d 1209, 1211 (11th Cir. 2004) (quoting *Consol. Bank, N.A. v. Dep't of Treas.* 118 F.3d 1461, 1463 (11th Cir. 1997)). "In the absence of an indication to the contrary, words in a statute

are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Ed. Enters., Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 664 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 113 S. Ct. 1489, 1494 (1993)).

The prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. State regulations of line items regulate the billing practices of cellular wireless providers, not the charges that are imposed on the consumer. Because the presentation of line items on a bill is not a "charge or payment" for service, Oxford English Dictionary (2d ed. 1989), it is an "other term or condition" regulable by the states, 47 U.S.C. § 332(c)(3)(A).

The Commission argues that the Second Report and Order is consistent with its previous decisions because the prohibition or requirement of line items "directly affect[s] [wireless service providers'] rates and rate structures in a manner that amounts to rate regulation." *Second Report and Order*, 20 F.C.C.R. at 6463 ¶ 31. According to the Commission, section 332(c)(3)(A) prohibits the state regulation of "rate structures" and "rate levels." *Id.* at 6462–63 ¶ 30. The Commission contends that state regulation of the use of line items "directly intrudes upon the carrier's ability to set rates and establish rate structures for [wireless] service." This argument fails.

In the Second Report and Order, the Commission failed to follow the common definition of "rates" employed in its previous decisions. The Commission has stated that "'rate' is defined in the dictionary as an 'amount of payment or charge based on some other amount.'" *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,901 ¶ 19. The Commission has also ruled that the phrase "rates charged" "'prohibit[s] states from prescribing, setting or fixing rates' of wireless service

providers." *Cellular Telecomms. Indus. Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (quoting *Pittencrieff Commc'ns., Inc.*, 13 F.C.C.R. 1735, 1745 ¶ 20 (1997)).

Until now, the Commission has consistently applied the distinction between "rates" and "other terms and conditions" to interpret whether a regulation amounts to rate regulation under section 332(c)(3)(A). 47 U.S.C. § 322(c)(3)(A). The Commission has concluded that the states may not regulate the method by which wireless service providers calculate the length of a call because it affects "which services to charge for and how much to charge for these services." *Sw. Bell Mobile Sys., Inc.*, 14 F.C.C.R. at 19,898 ¶ 1. Consistent with the distinction of "rates" and "other terms and conditions," the Commission has permitted the states to require wireless service providers "to contribute to state universal service mechanisms." *Pittencrieff*, 13 F.C.C.R. at 1741 ¶ 13. A universal service mechanism is a charge imposed by state or federal law on providers of telephone service "to make communications services available to all Americans at affordable rates." *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1334. Even though universal service charges have an "impact on the rates charged" to consumers, the Commission concluded that "universal service contribution requirement is not, within the plain meaning of the statute, a rate or entry regulation." *Pittencrieff*, 13 F.C.C.R. at 1742 ¶¶ 15, 16. Both decisions by the Commission follow the definition of "rates" in the dictionary as a "charge or a payment."

The Commission, by contrast, has defined a line item on a bill as something for which "a consumer receives no tangible product." *First Report and Order*, 14 F.C.C.R. at 7531 ¶ 61. According to the definitions espoused by the Commission, a line item is not a rate because "line-item charges cannot be attributed to individual tangible articles of commerce," *id.* at 7531 ¶ 61, but "a 'rate' has no significance without the element of service for which it applies," *Sw. Bell Mobile Sys.*,

Inc., 14 F.C.C.R. at 19,901 ¶ 19. The Commission asserts that the state regulation of line items affects "rate structures," but these regulations do not require a carrier to recover nor prohibit a carrier from recovering a particular cost. These regulations pertain only to the presentation of that cost on customer bills.

The Commission also failed adequately to explain its conclusion that a line item falls within the definition of "rates" because the use of line items has an alleged direct effect on rates. In the Second Report and Order, the Commission explained that "requiring or prohibiting the use of line items" has a "direct effect" on the ability of wireless service providers to structure rates, but other state regulations have an "indirect effect . . . on a company's behavior." *Second Report and Order*, 20 F.C.C.R. at 6466 ¶ 34 (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. 17,021, 17,034 ¶ 23 (2000)). The Commission requested further comments because it "recognize[s] that the line between prohibited and permissible state regulations of line items may not always be clear." *Id.* (internal quotations and citations omitted). The attempt by the Commission to distinguish the regulation of line items on cellular wireless bills from the imposition of universal service charges is unavailing.

That the prohibition or requirement of a line item has some effect on the charge to the consumer does not necessarily place a regulation within the meaning of "rates" and outside the ambit of state regulation of "other terms and conditions." The Commission argues that rate regulation includes the regulation of "rate structures" and "rate levels," *id.* at 6463 ¶ 31, but rate levels and rate structures are still components of "rates." The inclusion of the specific components "rate levels" or "rate structures" within the general term "rates" does not magically expand the authority of the Commission beyond what the statutory language allows.

The Commission has disavowed the argument that a regulation with some effect on prices is per se rate regulation under section 322(c)(3)(A). The Commission, for example, has upheld state regulations that require wireless service providers to contribute to the state-wide universal service fund as an "other term or condition." *Pittencrieff*, 13 F.C.C.R. at 1742 ¶¶ 42–43, *aff'd sub nom. Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1332. The Commission, in *Pittencrieff*, expressly rejected the argument that the imposition of a universal service fee was rate regulation because it "impacts the rates that a [wireless service] provider charges its customers." *Id.* at 1745 ¶ 20. The Commission stated, "The Commission has found the 'rates charged by' language to prohibit states from prescribing, setting, or fixing rates of [wireless service] providers. We have not found, however, that it preempts state authority over matters which may have an impact on the costs of doing business for a [wireless service] operator." *Id.* (footnotes omitted). "To equate state action that may increase the cost of doing business with rate regulation would . . . forbid nearly all forms of state regulation, a result at odds with the 'other terms and conditions' portion of the first sentence." *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1336, *aff'g Pittencrieff*, 13 F.C.C.R. 1735. If the imposition of a universal service charge has an "indirect" relationship with rates that places it within the purview of "other terms and conditions," then requiring or prohibiting the use of line items has an even more attenuated relationship with rates.

We can discern no logical distinction between what the Commission terms a "direct effect" caused by the regulation of line items and the alleged "indirect effect" caused by the imposition of universal service charges. *Second Report and Order*, 20 F.C.C.R. at 6466 ¶ 34. The Commission fails to explain why the imposition of universal service charges, which increases the amount a consumer is charged, is more

attenuated to the amount a consumer pays for service than the regulation of line items, which affects the presentation of matters on a bill. The Commission is unable to articulate a logical distinction between these two outcomes.

The Commission also contends that the Second Report and Order "is consistent with prior Commission statements equating 'line items' with 'rate elements.'" *Second Report and Order*, 20 F.C.C.R. at 6463 ¶ 30 & n.83. In support of this argument, the Commission relies on its decision in *Federal-State Joint Board of Universal Service*, 17 F.C.C.R. 24,952 (2002). In that decision, the Commission ruled that incumbent local exchange carriers may "recover their federal universal service contributions costs through a separate line item" as long as carriers do not "include[] a mark-up above the relevant contribution factor." *Id.* at 24,970 ¶ 31.

This argument fails for at least two reasons. First, *Federal-State Joint Board* is inapposite because the authority of the Commission to regulate federal universal service contribution derives from section 254(d) of the Communications Act, not section 332(c)(3)(A). The decision in *Federal-State Joint Board* does not govern whether the regulation of line items by the states is preempted under section 332(c)(3)(A). *Compare* 47 U.S.C. § 254(d) (granting the Commission authority to impose federal universal service charges), with *id.* § 332(c)(3)(A) (granting the Commission authority to regulate "entry" and "rates"). Second, although the Commission stated in *Federal-State Joint Board* that a federal universal service contribution is a "rate element" which may be recovered through a line item, *id.* at 24,979 ¶ 53 n.133, the Commission did not equate the *imposition* of the universal service contribution with the *presentation* of the universal service contribution on the bill. *Federal-State Joint Board* does not equate "line items" with "rate elements."

In the Second Report and Order, the Commission also

misconstrued the legislative history of section 332(c)(3)(A). *See Second Report and Order*, 20 F.C.C.R. at 6464 ¶ 32. The House Committee Report regarding section 332(c)(3)(A) explained that "other terms and conditions" of wireless service, which are regulated by the states, "include such matters as customer billing information and practices and billing disputes and other consumer protection matters." H.R. Rep. No. 103-111, at 211 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588. Because "our sole concern is the intent of Congress . . . , it is necessary to look to the administrative and legislative background of the enactment." *United States v. Zacks*, 375 U.S. 59, 62, 84 S. Ct. 178, 180 (1963). Contrary to the argument of the Commission, the legislative history shows that Congress intended to leave the authority to regulate line items with the states.

The Commission dismisses this statement from the legislative history as unpersuasive because it "nowhere suggests that states may regulate rates in the guise of regulating billing practices." The Commission explains that although "not all regulation relating to a carrier's billing and its relationship with customers represents preempted 'rate regulation,'" state regulations that require or prohibit line items are regulation. *Second Report and Order*, 20 F.C.C.R. at 6464 ¶ 33. The Commission counsels that we should look to the "substance, not merely the form" of the regulation to determine if it has a direct effect on rates. *Id.* at 6466 ¶ 34 (quoting *Wireless Consumers Alliance Order*, 15 F.C.C.R. at 17,037 ¶ 28).

This argument is flawed for at least two reasons. First, the Second Report and Order belies the contention by the Commission that line items are not a "billing practice." In the Order, the Commission expressly classifies the use of line items as a "billing practice." *Id.* Second, although we agree that the "substance, not merely the form" of a regulation governs whether it is rate regulation, *id.*, the Commission

does not articulate the "substance" that distinguishes whether a regulation of line items is a billing practice or rate regulation. The prohibition or requirement of the use of line items on wireless bills involves "billing information and practice," not "rates."

The interpretation of the term "rates" urged by the Commission deprives the complementary phrase "other terms and conditions" of all meaning. 47 U.S.C. § 332(c)(3)(A). "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001). If the presentation of line items on consumer bills were a matter of "rates" and not an "other term[] or condition[]" of wireless service, then the Commission would be free to preempt virtually any form of state regulation of wireless service, including laws regarding disclosure and consumer protection. 47 U.S.C. § 332(c)(3)(A). Under the interpretation of the Commission, even powers historically retained by the states, such as the imposition of state taxes, would be preempted so long as they impact "how carriers recover [the] costs of doing business." *Cf. Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("[T]he modes adopted to enforce the taxes levied [by the states] should be interfered with as little as possible."). The failure of the Commission to delineate the proper scope of rate regulation allows the Commission indefinitely to expand its authority without regard to the mandate by Congress that "other terms and conditions" remain the realm of state regulation. 47 U.S.C. § 332(c)(3)(A).

The interpretation by the Commission that the prohibition or requirement of line items is expressly preempted by the language of section 332(c)(3)(A) is not supported by the common definition of "rates." A "rate," as defined in the dictionary and previous decisions by the Commission, is

"[t]he amount of a charge or payment." Oxford English Dictionary (2d ed. 1989); *see Sw. Bell Mobile Sys.*, Inc., 14 F.C.C.R. at 19,901 ¶ 19. Because the regulation of line-item billing is not rate regulation, the express language of section 332(c)(3)(A) of the Communications Act does not preempt state regulations that require or prohibit the use of line items on cellular wireless bills.

IV. CONCLUSION

We **GRANT** the motion to dismiss the petition of the Vermont Board for lack of subject matter jurisdiction. We **DENY** the motion by the Vermont Board to correct the administrative record. We also **DENY** the motion by the Carriers to dismiss the petition of the State Consumer Advocates for lack of standing. Because the Communications Act allows the states to regulate line item billing for wireless services, we **GRANT** the petitions for review filed by the State Consumer

Advocates and the State Utility Regulators and **VACATE** the Second Report and Order.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NOS. 05-11682 AND 05-12601

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, PETITIONER,
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, INTERVENTOR-PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT,

AT&T CORPORATION,
CINGULAR WIRELESS, INC.,
LEAP WIRELESS INTERNATIONAL, INC.,
NEXTEL COMMUNICATIONS, INC.,
SPRINT CORPORATION,
T-MOBILE USA, INC.,
VERIZON,
CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, INTERVENORS-RESPONDENTS

VERMONT PUBLIC SERVICE BOARD, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT.

Nov. 29, 2006, Filed

(Opinion _____, 11th Cir., 19 ___, ___F.2d ___).

On Petition for Rehearing En Banc.

Petitions for Review of Decisions of the Federal Communications Commission.

Before: BLACK, PRYOR and COX, Circuit Judges.

PER CURIAM:

No Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing in En Banc are denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-11682

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, PETITIONER,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, INTERVENOR-PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT,

AT&T CORPORATION,
CINGULAR WIRELESS, INC.,
LEAP WIRELESS INTERNATIONAL, INC.,
NEXTEL COMMUNICATIONS, INC.,
SPRINT CORPORATION,
T-MOBILE USA, INC.,
VERIZON,
CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION, INTERVENORS-RESPONDENTS

Oct. 3, 2006. Filed

On Petitions for Panel Rehearing.

Petition for Review of a Decision of the Federal Communications Commission.

Before BLACK, PRYOR and COX, Circuit Judges.

PER CURIAM:

Upon consideration of the petitions for panel rehearing filed by the Federal Communications Commission and the Intervenors-Respondents, the opinion filed in this case on July 31, 2006, and published at 457 F.3d 1238, is modified in one respect. The final sentence of the opinion is deleted, and in its place the following is inserted:

> Because the Communications Act allows the states to regulate line item billing for wireless services, we **GRANT** the petitions for review filed by the State Consumer Advocates and the State Utility Regulators, **VACATE** the preemption ruling set forth in the Declaratory Ruling in the Second Report and Order, and **REMAND** the case to the Commission.

In all other respects, the petitions for panel rehearing are **DENIED.**

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC DOCKET NO. 98-170

IN THE MATTER OF TRUTH-IN-BILLING AND BILLING FORMAT

CG DOCKET NO 04-208

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES' PETITION FOR DECLARATORY RULING REGARDING TRUTH-IN-BILLING

SECOND REPORT AND ORDER, DECLARATORY RULING, AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 10, 2005
Released: March 18, 2005

Comment Date: 30 days after publication in the Federal Register.

Reply Comment Date: 60 days after publication in the Federal Register.

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein

approving in part, dissenting in part, and issuing separate statements.

I. INTRODUCTION

1. In this item, we address a Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates (NASUCA) seeking to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customers' bill that was not mandated or authorized by federal, state or local law.[1] In light of the significant consumer concerns with the billing practices of wireless and other interstate providers raised in this proceeding and outstanding issues from the 1999 *Truth-in-Billing Order and Further Notice*,[2] we also take this opportunity to reiterate certain aspects of our existing rules and policies affecting billing for telephone service. Specifically, we: 1) remove the existing exemption for Commercial Mobile Radio Service (CMRS) carriers from 47 C.F.R. § 64.2401(b) – requiring that billing descriptions be brief, clear, non-misleading and in plain language; 2) reiterate that non-misleading line items are permissible under our rules; 3) reiterate that it is misleading to represent discretionary line item charges in any manner that suggests such line items are taxes or charges required by the government; 4) clarify that the burden rests upon the carrier

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[1] Petition for Declaratory Ruling, filed by National Association of State Utility Consumer Advocates' (March 30, 2004) (NASUCA Petition). NASUCA is an association of 44 consumer advocates designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 FCC Rcd 7492 (1999) (*Truth-in-Billing Order and/or Further Notice*).

to demonstrate that any line item that purports to recover a specific governmental or regulatory program fee conforms to the amount authorized by the government to be collected; and 5) clarify that state regulations requiring or prohibiting the use of line items for CMRS constitute rate regulation and are preempted under section 332(c)(3)(A).

2. In addition, in a Further Notice of Proposed Rulemaking, we propose and seek comment on certain measures to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications service offerings. In particular, we: 1) tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges; 2) seek comment on the distinction between government "mandated" and other charges; 3) seek comment on whether it is unreasonable to combine federal regulatory charges into a single line item; and 4) tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale, and that such disclosure must occur *before* the customer signs any contract for the carrier's services. In an effort to address the potential for balkanized state regulation of CMRS and other interstate carrier billing practices, we also tentatively conclude that the Commission should reverse its prior holding permitting states to enact and enforce telecommunications carrier-specific truth-in-billing rules, and that the Commission should preempt inconsistent state regulation. We emphasize, however, that no action we propose will limit states' ability to enforce their own generally applicable consumer protection laws.

3. We believe that the truth-in-billing rules proposed herein and the clarifications we make will allow consumers to better understand their telephone bills, compare service

offerings, and thereby promote a more efficient competitive marketplace. As the Commission noted in 1998 when it initiated the Truth-in-Billing proceeding, the proper functioning of competitive markets is predicated on consumers having access to accurate, meaningful information in a format that they can understand.[3] Unless consumers are adequately informed about the service choices available to them and are able to make reasonable price comparisons between service offerings, they are unlikely to be able to take full advantage of the benefits of competitive forces.

II. BACKGROUND

A. The Truth-in-Billing Orders

4. In 1999, the Commission released the *Truth-in-Billing Order* to address concerns that there was growing consumer confusion relating to billing for telecommunications service and an increase in the number of entities willing to take advantage of this confusion. Consistent with sections 201(b) and 258 of the Communications Act of 1934, as amended (the "Act"),[4] the Commission adopted "broad, binding principles to promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing

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[3] *See Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Proposed Rulemaking, 13 FCC Rcd 18176 (1998).

[4] Section 201(b) requires that common carriers' "practices ... for and in connection with ... communications service, shall be just and reasonable, and any such ... practice ... that is unjust or unreasonable is hereby declared to be unlawful ...". 47 U.S.C. § 201(b). Section 258(a) makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258.

practices."[5]

5. The Commission stated that these truth-in-billing principles should apply to all carriers, including wireless carriers.[6] In general, the principles require: 1) that consumer telephone bills be clearly organized, clearly identify the service provider, and highlight any new providers; 2) that bills contain full and non-misleading descriptions of charges that appear therein; and 3) that bills contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges on the bill.[7] The Commission incorporated these principles into rules "because we intend for these obligations to be enforceable to the same degree as other rules."[8] However, most of the details regarding compliance with these obligations were left to the carriers to satisfy in a manner that best fit their own specific needs and those of their customers. At that time, the Commission determined that, although the *principles* and section 201(b) applied to all carriers, it would be appropriate to exempt CMRS carriers from three of the codified *rules* because they were deemed either inapplicable or unnecessary in the CMRS context.[9] In a Further Notice, however, the Commission sought comment on whether these rules should apply to CMRS carriers in the future.[10]

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[5] *See Truth-in-Billing Order*, 14 FCC Rcd at 7498, para. 9.

[6] *Id.* at 7501, para 13.

[7] *Id.* at 7496, para 5.

[8] *Id.* at 7499, para. 9; *see* 47 C.F.R. §§ 64.2400 and 2401.

[9] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 15. *See also* 47 C.F.R. § 64.2400(b).

[10] *Truth-in-Billing Further Notice*, 14 FCC Rcd at 7535, para. 68. In the Further Notice, the Commission also proposed standard labels for line items for charges associated with federal regulation.

6. On March 29, 2000, the Commission modified some of the Truth-in-Billing requirements in an Order on Reconsideration.[11] In addition, the Commission clarified that where an entity bundles a number of services, some of which may be provided by different carriers, as a single package offered by a single company, such offering may be listed on a telephone bill as a single offering.[12]

B. Joint Advertising Statement

7. On March 1, 2000, the Commission released a Joint Policy Statement with the Federal Trade Commission (FTC) to provide carriers with guidance about how principles of truthful advertising apply in the long distance service

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The Commission tentatively concluded that the following labels would be appropriate: "Long Distance Access" to identify charges related to interexchange carriers' costs for access to the networks of local exchange carriers; "Federal Universal Service" to describe line items seeking to recover universal service contributions; and "Number Portability" to describe charges relating to local number portability. The Commission asked for comments on these proposed labels and alternatives. *Id.* at 7537, para 71.

[11] *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Order on Reconsideration, 15 FCC Rcd 6023 (2000). Specifically, the Reconsideration Order: 1) modified the requirement for identification of new service providers to apply only to subscribed services for which the provider places periodic charges on the bill (i.e. not per-transaction basis such as dial-around or directory assistance—although those still have to be separated by provider); and 2) modified the "contact" requirement to allow for other electronic means in addition to the toll-free number, in limited cases where the customer does not receive a paper copy of the bill (for example billed by e-mail or Internet).

[12] *Id.* at 6027, para. 9.

marketplace.[13] The Commission explained that the need to address such issues arose from a proliferation of advertisements for dial-around numbers, long-distance calling plans, and other new telecommunications services; combined with an increase in the number of complaints regarding how these services were promoted.[14] In addition, the Joint Policy Statement noted that the FCC found that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b) of the Act.[15] The Commission and FTC provided specific examples of misrepresentations in advertisements for long-distance service and material information that carriers should clearly and conspicuously disclose in such advertisements to comply with section 201(b).[16]

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[13] *See Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers*, File No. 00-72, 15 FCC Rcd 8654 (2000) (*Joint Policy Statement*).

[14] *Id.* at 8655, para. 3.

[15] *Id.* at para. 4.

[16] *See id.* at 8657-69, paras. 11-32. For example, the Statement provided the following example of misleading advertising:

> A 30-second television advertisement for a long-distance calling plan features a spokesperson who on three occasion states that calls on the plan are "10¢ a minute anytime." In addition, a graphic reading "10¢ a minute anytime" is depicted twice during the ad. In fact, the 10¢ a minute rate requires the payment of a $5.95 monthly fee. The only disclosure of the monthly fee is through a visual superscript at the end of the ad. Especially because the triggering representation—that calls on the plan are "10¢ a minute anytime"—was made both orally and visually, the visual superscript would likely be less effective in disclosing the monthly fee than had the same information been conveyed both orally and visually.

C. Universal Service Contribution Order

8. In 2002, the Commission released the *Universal Service Fund Contribution Order* (*USF Contribution Order*), which examined the reasonableness of a line item that purported to describe Universal Service fees under section 201(b).[17] The amount of the Universal Service line item imposed by carriers on customers often varied from the contribution factor used to calculate the carriers' actual obligation to the fund. The Commission noted that an analysis of federal universal service line-item charges across industry segments revealed that such charges often bore little or no relationship to the amount of the assessment.[18] The Commission stated that to the extent that carriers recover

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Joint Policy Statement, Example #20.

[17] *See generally Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated With Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket No. 98-171, Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, CC Docket No. 92-237, Number Resource Optimization, CC Docket No. 99-200, Telephone Number Portability, CC Docket No. 95-116, Truth-In-Billing and Billing Format, CC Docket No. 98-170, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24979, para. 54 (2002) (*USF Contribution Order*).

[18] *Id.* at 24977, para 47. "We are concerned, however, that the flexibility provided under our current rules may have enabled some companies to include other completely unrelated costs in their federal universal service line items." *Id.* at 24978, para 49.

their contribution costs through a separate line item on customer bills, they must accurately describe the nature of the charge.[19]

9. The Commission found it was "unreasonable" under section 201(b) for carriers to characterize administrative and other costs as part of regulatory fees or universal service charges. The Commission stated that such costs are no different than other costs associated with the business of providing telecommunications service and, although they could be recovered through rates or other line item charges, it is unreasonable to describe an amount as a universal service regulatory fee when that amount varies from the contribution factor.[20] Carriers, therefore, are prohibited from including administrative costs in line items that are "characterized as federal universal service contribution recovery charges."[21]

10. The Commission stated that the elimination of mark-ups in carrier universal service line items would alleviate end user confusion and frustration, and "foster a more competitive market by better enabling customers to comparison shop among carriers."[22] The Commission also concluded that this action would further the goal of "promoting transparency for the end user in order to facilitate informed customer choice."[23] Finally, the Commission declined at that time to mandate a specific label for federal universal service line-items, but said it would monitor the

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[19] *Id.* at para. 51.

[20] *Id.* at 24980, para 54.

[21] *Id.*

[22] *Id.* at 24978, para 50.

[23] *Id.*

order's effect on carrier practices.[24]

D. State and Industry Actions

11. In 2003, the wireless industry developed the CTIA Consumer Code to facilitate the provision of accurate information between consumers and wireless service providers.[25] Over 30 wireless service providers, including many national providers, are signatories to the Code. In relevant part, the Code requires that signatory carriers "Disclose Rates and Terms of Service to Consumers." [26] Among the disclosures mandated by that provision is the disclosure of "the amount or range of any . . . fees or surcharges that are collected and retained by the carrier." In addition, the Code requires that carriers separately identify carrier charges from taxes on billing statements.[27]

12. In July 2004, Attorneys General from 32 states entered into settlement agreements with Verizon Wireless, Cingular Wireless, and Sprint PCS regarding allegations of misleading advertisements and unclear disclosures relating to

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[24] *Id.* at 24983, para 65

[25] *See* http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.

[26] CTIA Code, Item One.

[27] CTIA Code, Item Six:

> On customers' bills, carriers will distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal, state, or local governments. Carriers will not label cost recovery fees or charges as taxes.

service agreement terms and wireless coverage areas.[28] Specifically, with regard to consumer bills, carriers agreed to separate "taxes, fees, and other charges that [they are] required to collect directly from Consumers and remit to federal, state, or local governments, or to third parties authorized by such governments, for the administration of government programs" from monthly charges and all other discretionary charges, except when the taxes, fees and other charges are bundled into a single rate with monthly charges for service and all other discretionary charges.[29] The carriers also agreed to not represent, expressly or by implication, that the discretionary costs recovery fees are taxes.[30] In addition, the carriers agreed to make point of sale disclosures describing all charges appearing on consumers' bills.[31]

E. NASUCA Petition

13. On March 30, 2004, NASUCA filed a Petition for Declaratory Ruling in the Truth-in-Billing and Billing Format Docket urging the Commission to address what it describes as the growing problem of consumer confusion with telephone bills. Specifically, NASUCA requested that

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[28] *See* Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, FCC, dated Jan. 10, 2005 (Attachment – Assurance of Voluntary Compliance) (Verizon AVC). The thirty two states include: Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin and Wyoming.

[29] Verizon AVC at 14, para. 36(a).

[30] *Id.* at para. 36(b).

[31] *Id.* at 5-9, paras. 17-23.

the Commission clarify that telecommunications carriers – both wireline and wireless – are prohibited from imposing line-item charges, surcharges or other fees on customers' bills unless those charges are expressly mandated or authorized by a federal or state law. NASUCA argues that allowing the inclusion of line items that are not mandated or authorized by the government violates the truth-in-billing principles and rules and both section 201(b) and 202 of the Act. In addition, NASUCA argues that the amount of any such government mandated charge must conform to the amount expressly authorized by federal, state, or local governmental authority. NASUCA's Petition sets forth numerous examples of line item charges imposed by interexchange (IXC) and wireless carriers that it contends are misleading or unreasonable.[32] On May 25, 2004, the Consumer & Governmental Affairs Bureau issued a public notice seeking comment on the Petition in a newly created CG Docket 04-208. In addition to numerous individual consumers, more than 40 parties filed comments in response to the Petition.

III. SECOND REPORT AND ORDER

A. Background

14. In the *Truth-in-Billing Order*, the Commission concluded that the broad principles adopted to promote truth-in-billing should apply to all telecommunications carriers,

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[32] *See* NASUCA Petition at 18-23, 29 (contending that, for example, surcharges identified as "regulatory assessment fees," "carrier cost recovery charges," "interstate access surcharge," "universal connectivity charge," and "primary carrier charge" do not allow customers to accurately assess what they are being billed for or permit customers to determine whether the amounts charged conform to the price charged for service).

both wireline and wireless.[33] The Commission noted that these principles represent fundamental statements of fair and reasonable practices. The Commission therefore rejected the argument that certain classes of carriers should be wholly exempt from complying with the truth-in-billing guidelines solely because competition exists in the market which they operate.[34] In the wireline context, the Commission incorporated these principles and guidelines into rules for enforcement purposes "after considering an extensive record of both the nature and volume of customer complaints, as well as substantial information about wireline billing practices."[35]

15. In the wireless context, however, the Commission found that the record did not reflect the same high volume of customer complaints, nor did the record indicate that CMRS billing practices failed to provide consumers with the clear and non-misleading information they need to make informed choices.[36] The Commission therefore exempted CMRS carriers from the truth-in-billing rule that requires charges contained on telephone bills to be accompanied by a brief, clear, non-misleading, plain language description of the

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[33] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 13 ("[l]ike wireline carriers, wireless carriers also should be fair, clear, and truthful in their billing practices").

[34] *Id.*

[35] *Id.* at para. 15.

[36] *Id.* at 7502, para. 16. The Commission also noted that notwithstanding the decision not to apply these guidelines to CMRS providers, that such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202, "and our decision here in no way diminishes such obligations as they may relate to billing practices of CMRS carriers." *See Truth-in-Billing Order*, 14 FCC Rcd at 7502, para. 19.

service or services rendered.[37] In addition, the Commission found certain of the truth-in-billing rules inapplicable to CMRS.[38] In a Further Notice of Proposed Rulemaking, the Commission sought comment on whether the truth-in-billing rules adopted in the wireline context should apply to CMRS carriers in order to protect consumers.[39] The Commission reiterated that all consumers expect and should receive bills that are fair, clear, and truthful, but sought further comment on whether such a problem existed in the wireless context, and to what extent the presence of a competitive market is relevant to consumers' ability to protect themselves from the harms that the truth-in-billing rules were designed to address.[40] The majority of commenters, representing primarily CMRS providers, responded that the lack of billing complaints against wireless providers along with the competitive nature of the wireless industry should indicate that it is not necessary to apply these rules to CMRS.[41] The

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[37] *See* 47 C.F.R. §§ 64.2400(b), 64.2401(b).

[38] For example, because CMRS carriers are excluded from equal access obligations, the Commission concluded that CMRS carriers will seldom need to indicate a new long distance service provider on their bill. *See Truth-in-Billing Order*, 14 FCC Rcd at 7502, para. 16. The Commission concluded that CMRS carriers must comply with two of the truth-in-billing rules: 1) that the name of the service provider associated with each charge be clearly identified; and 2) that each bill should prominently display a telephone number that customers may call free-of-charge in order to inquire or dispute any charge contained on the bill. *See* 47 C.F.R. § 64.2401(a)(1) and (d).

[39] *Truth-in-Billing Further Notice*, 14 FCC Rcd at 7535-36, paras. 68-70.

[40] *Id.* at paras. 68-69.

[41] *See, e.g.*, Bell Atlantic Mobile 1999 Comments at 3; CTIA 1999 Comments at 5; PCIA 1999 Comments 4-5.

California Public Utilities Commission, on the other hand, argued that section 64.2401(b) of our rules is so fundamental that it should apply to all telecommunications carriers, including CMRS carriers.[42] Finally, responding to the Commission's suggestion that parties address the applicability of a section 10 forbearance analysis,[43] a few commenters suggested that the Commission should consider forbearing the truth-in-billing requirements to CMRS carriers.[44]

B. Discussion

16. We conclude that CMRS carriers should no longer be exempt from 47 C.F.R. § 64.2401(b)'s requirement that billing descriptions be brief, clear, non-misleading and in plain language. In creating this exemption in 1999, the

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[42] *See* Cal PUC July 26, 1999 Comments (also maintaining that 47 C.F.R. § 64.2401(a)(2) and (c) should apply to CMRS carriers, the former in the event a CMRS carrier bills for charges for two or more carriers, and the latter in the event a CMRS carrier also bills for charges for basic local service).

[43] *Truth-in-Billing Order*, 14 FCC Rcd at 7535, para. 69.

[44] *See, e.g.*, Omnipoint 1999 Comments at 5; PCIA 1999 Comments at 8. Neither Omnipoint nor PCIA suggest that they were formally petitioning the Commission for forbearance under section 10(c) of the Act. Section 10(c) establishes a one-year statutory deadline for Commission action on forbearance petitions, and provides that a petitioning party's requested relief is "deemed granted" if the Commission does not act within that timeframe. *See* 47 U.S.C. § 160(c). The Commission did not treat these comments as petitions filed under section 10(c), nor did any party subsequently suggest that the procedure under section 10(c) had been triggered. Accordingly, while we discuss these parties' comments regarding forbearance below, we do not recognize their comments as triggering the requirements of section 10(c) and do not recognize the relief as having been granted by operation of law.

Commission relied upon the fact that the record did not indicate a high volume of complaints in the CMRS context.[45] The Commission's more recent data indicates that complaints regarding wireless "billing & rates" and "marketing & advertising" have increased significantly since that time. For example, in 1999, the Commission received only a few dozen complaints regarding wireless billing.[46] In 2004, the Commission received approximately 18,000 complaints about wireless carrier practices in these categories.[47] This trend is supported by the recent comments of a number of states and consumers in this proceeding.[48] Although we acknowledge that this increase may be due in part to the significant increase in wireless subscribers since 1999, we also believe it is demonstrative of consumer confusion and dissatisfaction with current billing practices.

17. We disagree with those commenters that argue that CMRS providers should be exempted from this requirement

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[45] *Truth-in-Billing Order*, 14 FCC Rcd at 7501-02, para. 16.

[46] *See id.* at 7564, Concurring Statement of Commissioner Michael K. Powell.

[47] *See* First and Second *Quarterly Report on Informal Consumer Inquiries and Complaints* (rel. Feb. 11, 2005); Third and Fourth *Quarterly Report on Informal Consumer Inquiries and Complaints* (rel. March 4, 2005). *See also* 2003 *Quarterly Report on Informal Consumer Inquiries and Complaints* (rel. May 10, 2003; Sept. 12, 2003; Nov. 20, 2003 and June 10, 2004). Complaints filed in the categories of "billing and rates" and "marketing and advertising" constituted over one-half of the total complaints filed against wireless providers in 2003.

[48] *See, e.g.*, Cal. PUC Comments at 6-7; Texas OAG Comments at 2; Consumers Union Comments at 3; Joseph Canfora Comments at 1; John Gantz Comments at 1; Nancy Murray Comments at 1.

because they operate in a competitive marketplace.[49] The Commission specifically rejected this argument in the *Truth-in-Billing Order* noting that, as competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace.[50] Although we agree that a robustly competitive marketplace provides the best incentive for carriers to meet the needs of their customers and affords dissatisfied customers with an opportunity to change carriers, we also recognize that some providers in a competitive market may engage in misconduct in ways that are not easily rectified through voluntary actions by the industry.[51] As the Commission emphasized in the *Truth-in-Billing Order*, one of the fundamental goals of the truth-in-billing principles is to provide consumers with clear, well-organized, and non-misleading information so that they will be able to reap the advantages of competitive markets.[52] We believe that making the requirements of 47 C.F.R. § 64.2401(b) mandatory for CMRS will help to ensure that wireless consumers receive the information that they require to make informed decisions in a competitive marketplace.

18. For the reasons discussed above, we also do not

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[49] *See, e.g.*, AT&T Wireless Comments at 2; CTIA Comments at 8; PCIA 1999 Comments at 5.

[50] *See Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 14.

[51] *See also Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16868 at para. 23 (*PCIA Forbearance Order*) (1998) ("[a]ssuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner").

[52] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 14.

believe it would be appropriate to forbear from applying the truth-in-billing rules to CMRS carriers. We find that the record before us does not reflect that all three statutory criteria established under section 10 have been satisfied. Specifically, the record does not reflect that these requirements are unnecessary to ensure that the charges and practices of carriers are just and reasonable, or that forbearance is consistent with the public interest. To the contrary, the increasing number of consumer complaints to this Commission and state regulatory agencies regarding wireless billing practices provides empirical evidence that application of the truth-in-billing rules to CMRS carriers is necessary and in the public interest. It is critical for consumers to receive accurate billing information from their carriers to take full advantage of the benefits of a competitive marketplace. We also note that the Commission declined to forbear from the application of sections 201 and 202 of the Act to broadband Personal Communications Service (PCS), concluding that those sections "lie at the heart of consumer protection under the Act."[53] In the *PCIA Forbearance Order*, the Commission noted that it had never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.[54]

19. The Commission already has concluded that the truth-in-billing principles, including the principle that billing descriptions be brief, clear, non-misleading and in plain language, apply to both wireline and wireless.[55] The Commission also noted that CMRS billing practices remain

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[53] *See PCIA Forbearance Order*, 13 FCC Rcd at 16865, para. 15.

[54] *Id.* at 16866, para. 17.

[55] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 14.

subject to the reasonableness and nondiscrimination requirements of sections 201 and 202 of the Act.[56] Thus, we do not believe that making this requirement mandatory will constitute a significant new regulatory burden on CMRS providers, including smaller providers.[57] We believe that eliminating the exemption from 47 C.F.R. § 64.2401(b) for CMRS providers will remove any ambiguity regarding the necessity of CMRS carriers to provide clear and non-misleading billing information to their customers. In addition, CMRS carriers are put on notice that the Commission intends to review complaints regarding unclear or misleading billing descriptions, and may take enforcement action under this rule as appropriate based on such complaints or other evidence of non-compliance.

20. Though we remove the exemption from 47 C.F.R. § 64.2401(b) for CMRS providers, and thereby erase any ambiguity regarding the necessity of CMRS carriers to provide clear and non-misleading billing information to their customers under our rules, we recognize that states may wish to play a role in enforcing rules against CMRS and other interstate carriers providing misleading billing information. At a minimum, we emphasize that no action that we take in this *Second Report and Order* and the *Declaratory Ruling* below limits states' authority to enforce their own generally applicable consumer protection laws, to the extent such laws do not require or prohibit use of line items, nor limits a state's ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must

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[56] *Id.* at 7502, para. 19.

[57] *See* Cingular Comments at 7-11 (contending that Cingular is already in compliance); Leap Comments at 9-11 (fees meet truth-in-billing requirements); Verizon Wireless Comments (bills comply with federal law even though Verizon Wireless is not subject to truth-in-billing rules).

contribute. In the *Second Further Notice* below, we seek comment on specifically where to draw the line between the Commission's jurisdiction and states' jurisdiction over the billing practices of CMRS and other interstate carriers.

IV. DECLARATORY RULING

A. Background

21. In its Petition for Declaratory Ruling, NASUCA raises concerns about the use of line items on consumer telephone bills. NASUCA contends that, in some cases, the exact nature of the line items are often unclear from the descriptions, and the line items are characterized in a way that could mislead consumers into believing these charges are government mandated charges. Further, NASUCA contends that the descriptions of such line items often have little or no relationship to the actual charge listed on the bill.

22. NASUCA requests that the Commission prohibit telecommunications carriers – both wireline and wireless - from imposing monthly line-item charges, surcharges or other fees on customers' bills unless such charges expressly have been mandated or authorized by a regulatory agency.[58] NASUCA does not object to line items for "government mandated fees," nor does it object to "government authorized fees." NASUCA argues that allowing the inclusion of line items that are not mandated or authorized by the government violates the Truth-in-Billing principles and rules, the *USF Contribution Order*, and both sections 201(b) and 202 of the Act.

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[58] NASUCA asks that if we deem a Petition for Declaratory Ruling to be procedurally lacking for their proposals, that we instead initiate a new rulemaking.

B. Discussion

1. NASUCA Petition

23. We deny NASUCA's request for a Declaratory Ruling prohibiting telecommunications carriers from imposing any line items or charges that have not been authorized or mandated by the government. There is no general prohibition against the use of line items on telephone bills under our rules or the Act. As NASUCA has acknowledged, nothing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items.[59] To the contrary, the *USF Contribution Order* states that while carriers cannot include administrative costs under the umbrella of regulatory charges, they may recover such costs through their rates or "other line items."[60] The truth-in-billing rules require that charges contained on telephone bills be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered.[61] If carriers choose to offer descriptions of various charges in the form of line items, however, there is nothing in the existing Truth-in-Billing requirements to prevent them from doing

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[59] *See generally Truth-in-Billing Order*, 14 FCC Rcd 7492; *see also* NASUCA Petition at 8, and n.16. *See also* AT&T Comment at 5 (no Commission order or rule that prohibits impositions of line-item charges).

[60] *See USF Contribution Order*, 17 FCC Rcd at 24979, para. 55. *See also* Sprint Comments at 6 (citing the USF Contribution Order and E911 proceeding); USTA Comments at 4 (the only unresolved matter is how to standardize line items); Verizon Comments at 3-5 (the Commission has expressly authorized the recovery of specific line item surcharges in Commission proceedings such as the USF Contribution Order, and proceeding regarding Local Number Portability fees); BellSouth Comments at 5 (NASCUA has failed to show a controversy or uncertainty).

[61] 47 C.F.R. § 64.2401(b).

so.[62] Nor do we believe there is any basis to conclude that such a practice is "unreasonable" under section 201(b). As several commenters have noted, the provision of accurate and non-misleading information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers.[63] In sum, we reiterate that carriers are not prohibited *per se* under our existing Truth-in-Billing rules or the Act from including non-misleading line items on telephone bills.[64]

24. Commenters in this docket have supplied evidence that there is considerable consumer confusion regarding telephone bills and even possible abuse of line item

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[62] *See* Sprint Comments at 15 and AT&T Comments at 10, 13 (the Commission left it up to the carriers to decide how to meet Truth-in-Billing requirements).

[63] *See, e.g.*, CTIA Comments at 3; Global Crossing Comments at 2; Verizon Wireless Comments at 14.

[64] We note that this finding does not alter the role of any other specific prohibition or restriction on the use of line items. For example, this Commission has prohibited line items for interstate Telephone Relay Service (TRS) costs. *See Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802, 1806, para. 22 (1993). *See also* Report and Order and Request for Comments, 6 FCC Rcd 4657, 4664, para. 34; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 12224, 12228 n.33 (2004). As noted *infra*, we intend to revisit the prohibition on line items referring to interstate TRS in a future proceeding in a separate docket that will take into consideration the policy objectives outlined in this proceeding.

charges.[65] Both the Texas Office of the Attorney General

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[65] *See, e.g.*, TURN & UCAN Comments at 4 (contending that there has been a proliferation of deceptive, misleading charges). The National Consumers League says that complaints about billing descriptions have increased, prompting the group to create a link on their website regarding "Understanding Your Phone Bill," but the group has difficulty keeping this up-to-date with the vague line items (Consumers League Comments at 4-5). Consumers Union, the National Consumer Law Center, and the Massachusetts Union of Public Housing Tenants say the truth-in-billing principles have failed to clean up the clutter and to help consumers make informed choices about their service (Consumers Union Comments at 4). Ohio PUC describes consumer confusion over vague charges that appear to be regulatory in origin, such as "Government Assessment" charges (Ohio PUC Comments at 8-10). Indiana URC contends that the practice of placing extra charges not expressly mandated or clearly disclosed on customer bills is misleading and does not comport with the spirit of the Act (Indiana URC Comments at 2). The Iowa UB says that it is difficult to determine if the surcharge is recovering only what the actual regulatory costs are to that carrier or operating costs; thus, the true cost of service is obscured, which makes it difficult for a consumer to make cost-based comparisons between competing service providers (Iowa UB Comments at 2). The Texas OAG states: "The State of Texas has received countless bills containing instances of regulatory fees and surcharges purporting to recover 'regulatory' or 'administrative' costs, but which upon further analysis are nothing other than regular operating expenses, such as those incurred by any other business" (Texas OAG Comments at 2). The commenting "Rural Wireline Carriers" contend that some of them provide interexchange services in competition with carriers that impose misleading line item surcharges described in NASUCA's Petition (RWC Comments at 2). Massachusetts OAG contends that market forces alone are not sufficient to ensure that consumers are not deceived and can make accurate price comparisons (Massachusetts OAG Comments at 2). Teletruth provides details of a two-year investigation into consumer phone bills by Teletruth and New Networks Institute, a market research

and the Iowa Utilities Board, for example, note that increasing amounts of their resources are devoted to reviewing various surcharges, in response to consumer complaints.[66] We recognize that the provision of accurate information on consumer telephone bills is among one of the most important issues for telecommunications consumers. In particular, we are concerned that some carriers may be disguising rate increases in the form of separate line item charges and implying that such charges are necessitated by governmental action. As a result, we take this opportunity to reiterate, and provide some additional clarifications to, our existing rules, and we seek further comment on additional proposals below that we believe would be beneficial in ensuring that consumers receive accurate information. We also recognize that overbroad state regulations in this area may frustrate our federal rules and the federal objective of minimizing regulatory burdens on the competitive CMRS industry. Moreover, we note that in establishing the regulatory framework for CMRS, Congress expressly assigned certain tasks, including rate regulation, to the federal government. Accordingly, we also discuss the roles of federal and state authority in this area, and identify those types of state regulations that expressly are preempted by the Act.

2. Application of Section 201(b) to Line Items

25. Section 201(b) of the Act requires that all charges, practices, classifications, and regulations for and in

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firm, and LTC Consulting, a phone bill auditing firm (*see generally* Teletruth Comments). Several consumer commenters also express discontent with the line item charges on their bills. *See, e.g.*, Jason G. Campbell Comments.

[66] Texas OAG Comments at 2; Iowa UB Comments at 2 (hundreds if not thousands of consumer inquiries concerning current billing practices).

conjunction with interstate communications service be just and reasonable, and gives the Commission jurisdiction to enact rules to implement that requirement.[67] The Commission has concluded that a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b).[68]

26. Although we have not prohibited carriers from using line items, we reiterate here that all carriers are prohibited from including misleading information on their telephone bills. We believe that it is useful to now provide some additional detail on whether certain practices may be deemed unreasonable or misleading under our rules.[69] It appears from the record that a common source of consumer confusion derives from the myriad of charges that are assessed by carriers ostensibly to recover costs incurred as a result of specific government action. These regulatory charges generally can be characterized as mandated fees or taxes that the carrier is required to collect from the consumer (*e.g.*, federal excise tax),[70] authorized fees that the carrier has the discretion to pass on to the consumer (*e.g.*, universal service), and administrative or other costs that may be associated with the cost of compliance with regulatory requirements. We emphasize that it is permissible for carriers to recover these costs so long as they do so in a manner that complies with our rules.

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[67] 47 U.S.C. § 201(b).

[68] *See Truth-in-Billing Order*, 14 FCC Rcd at 7560, para. 24.

[69] We emphasize that our statements herein are of general applicability and are not intended to supersede more specific federal rules that may govern the recovery of particular fees.

[70] *See, e.g.*, 26 U.S.C.A. § 4251(a)(2) ("Payment of [excise] tax. – The tax imposed by this section shall be paid by the person paying for such services").

27. Consistent with the Commission's prior findings, we reiterate that it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge.[71] Consumers may be less likely to engage in comparative shopping among service providers if they are led to believe erroneously that certain rates or charges are unavoidable federally mandated amounts from which individual carriers may not deviate.[72] This prohibition includes not only misleading statements or descriptions, but also placement of the charge on the bill in such a way as to lead a reasonable consumer to believe that the charge has been mandated by the government. For example, because placing a discretionary charge in a section or subsection of the bill that otherwise contains only government required charges or taxes may mislead a reasonable consumer into believing that such charge also is required, such placement is not allowed. We also are concerned that some carriers may be labeling certain non-regulatory line item charges in such a way as to create confusion with regulatory programs. As a result, carries should take great caution in using terms that are most commonly associated with governmental programs to describe other charges that are unrelated to those programs.[73]

28. Consistent with the Commission's conclusion in the *USF Contribution Order*, we reiterate that it is unreasonable

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[71] *See Truth-in-Billing Order*, 14 FCC Rcd at 7527, para. 56.

[72] *See id.* at 7522-23, para. 49.

[73] *See, e.g.*, NASUCA Petition at 29-30 (arguing that one carriers' "TSR Administrative Fee" is designed to be confused with the Telecommunications Relay Service (TRS) charge, and another's "Universal Connectivity Charge" may be confused with a separate universal service charge on that carrier's bill).

and misleading for carriers to include administrative and other costs as part of "regulatory fees or universal service charges" or similar line item labels that imply government mandated charges.[74] Although the Commission focused primarily on the universal service charge, we reiterate here that, as the language in that order indicates, this prohibition applies to all regulatory fees. It is our view that these costs are no different than other costs associated with the business of providing telecommunications service and may be recovered through rates or other line item charges.[75] Thus, it is an unreasonable practice for carriers to include any costs that do not accurately reflect the carrier's actual obligation to the specific governmental program that the line item purports to recover. For example, carriers that elect to recover their universal service contribution costs through a separate line item may not mark up the line item above the relevant contribution factor established by the Commission.[76] As a result, a regulatory line item charge should never exceed any maximum amount or cap established by the government to recover for that specific program. Carriers that are not rate-regulated by this Commission, namely interexchange carriers, CMRS providers, and competitive local exchange carriers will have the same flexibility that exists today to recover legitimate administrative and other costs, and may recover those legitimate administrative and other related costs through rates or other line items.

29. To the extent that a carrier decides to collect a regulatory fee through a separate line item, we clarify that the

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[74] *USF Contribution Order*, 17 FCC Rcd at 24979, para. 54.

[75] *Id.*

[76] *See id.* at 24978, paras. 49-51 (noting that if the contribution factor is 7.28%, a carrier's federal universal service line item charge cannot exceed 7.28%).

burden rests upon the carrier to demonstrate that the charge imposed on the customer accurately reflects the specific governmental program fee it purports to recover. This burden is satisfied if the carrier demonstrates that the line item charge in question falls within any maximum level allowed by the government for its recovery.[77] In those instances, however, when a carrier is not subject to a maximum cap or other specific guidelines for its recovery, the carrier should be prepared to demonstrate that the cost imposed pursuant to a regulatory line item charge corresponds to the amount remitted to the government or its agent for that program. As discussed above, it is not permissible for a carrier to collect administrative or other charges pursuant to a line item that describes a specific governmental program or fee. Thus, carriers should be able to demonstrate with probative accounting documentation and other relevant evidence that the amounts collected for specific governmental programs and fees equals the amount submitted to the government or its agent for that program.

3. Section 332

30. We find that state regulations requiring or prohibiting the use of line items – defined here to mean a discrete charge identified separately on an end user's bill – constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act. This statutory provision states, in relevant part:

> [N]o State or local government shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service or

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[77] *See, e.g.*, 47 C.F.R. § 54.712 ("the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor").

> any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[78]

As the D.C. Circuit has recognized, Congress did not specifically define "rates," "entry," or other key terms in section 332(c)(3)(A).[79] The Commission, however, consistently has interpreted the rate regulation provision of the statute to be broad in scope. The Commission has interpreted this provision to "prohibit states from prescribing, setting or fixing rates" of wireless service providers.[80] The Commission also has made clear that the proscription of state rate regulation extends to regulation of "rate levels" and "rate structures" for CMRS.[81] Along these lines, the Commission has found that section 332(c)(3)(A) not only prohibits states from prescribing "how much may be charged" for CMRS, but also prohibits states from prescribing "the rate elements for CMRS" or "specify[ing] which among the CMRS services provided can be subject to charges by CMRS providers."[82] We also note that our interpretation here is consistent with prior Commission statements equating "line

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[78] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[79] *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

[80] *Id.*, citing *Pittencrief Communications, Inc.*, 13 FCC Rcd 1735, 1745 (1997) ("*Pittencrief Order*").

[81] *Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd 19898, 19906-07, paras. 18-20 (1999) ("*Southwestern Bell Order*").

[82] *Id.* at 19907, para. 20.

items" with "rate elements."[83] Recognizing the Commission's broad prior interpretation of rate regulation and statements about line items, we find that state regulations[84] requiring or prohibiting line items similarly fall

[83] For example, in discussing the manner in which federal universal service contributions may be reflected on end users' bills, the Commission explained that "incumbent local exchange carriers are required to recover their federal universal service contribution costs through *a line item*, which may be combined for billing purposes with *another rate element*." *USF Contribution Order*, 17 FCC Rcd at 24979, para. 53 n.133 (emphasis added). And in a prior order on the same subject matter, the Commission approved a plan permitting local phone companies to establish "a separate rate element (*e.g.* line item)" to recover federal universal service contributions. *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13057-58, paras. 218-19 (2000).

[84] We note that the terms "state regulation" and "state regulatory action" have broad application in the context of section 332. *See Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws*, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17027, para. 12 (2000) ("*Wireless Consumers Alliance Order*") (recognizing that judicial, legislative and administrative action all can constitute state regulation under section 332).

within the statute's zone of proscribed state regulatory activity.[85]

31. A closer look at the type of state regulations in question reveals that many directly affect CMRS carriers' rates and rate structures in a m nner that amounts to rate regulation. State regulations that *prohibit* a CMRS carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates.[86] Parties have submitted several examples of state regulations and proposals in this category, all of which are preempted by the Act.[87] As a further illustration, we note that the

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[85] We note that our analysis of section 332 herein has no effect on voluntary agreements between CMRS carriers and states such as the one discussed above in para. 12.

[86] We recognize that precluding states from prohibiting carriers from using line items on an end user's bill may be in tension with our prior conclusion in the TRS context that carriers may not recover interstate TRS costs as a specifically identified line item. *See supra* n.64. Although we recognize that the prohibition on line items referring to interstate TRS reflects concerns specific to TRS's genesis in Title IV of the Americans with Disabilities Act of 1990, as noted above, we intend to revisit this TRS-related prohibition in a future proceeding in a separate docket.

[87] *See, e.g.*, Letter from John T. Scott, III, Vice President & Deputy General Counsel Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 04-208 and CC Docket No. 98-170, at 5 (filed Jan. 25, 2005) (Verizon Wireless Jan. 25 *Ex Parte*). Such state regulations include a Vermont Public Service Board proposal to prohibit carriers from itemizing a separate charge to recover the Vermont gross receipts tax imposed on carriers, *see* Public Service Board Proposed Rule 7.617(c); an Indiana Utility Regulatory Commission letter prohibiting carriers from placing a

regulatory relief sought by NASUCA in its Petition (*i.e.*, a regulation curtailing a CMRS carrier's ability to structure its bills and isolate charges into separate line items) would have a direct effect on a CMRS carrier's rate structure presented to its end users and, if instituted by a state commission, would be preempted by the Act. We find that the converse is also true: a state rule *requiring* CMRS carriers to segregate particular costs into line items represents the other side of the same coin, and similarly would limit a carrier's ability to set and structure its rates. Parties have submitted at least one example of such a requirement.[88] That this type of line item regulation would affect a CMRS carrier's rates and rate structure is particularly evident when considering that most CMRS carriers (as discussed in more detail below) market and price their services on a national basis. A CMRS carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction.

32. While we hold that state regulation prohibiting or

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line item for the Indiana Utility Receipts tax on their bills, *see* Letter from Christopher R. Day, Counsel, Government Affairs, Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 04-208 (filed Dec. 22, 2004); and a Georgia law prohibiting recovery of carrier contributions to the state universal service fund through separate charges, *see* NASUCA Petition at 65 n.170. The statutory preemption we recognize in this item is not limited to these particular state rules, but would apply to other rules, now and in the future, that constitute "rate regulation" in the manner described above.

[88] *See* Verizon Wireless Jan. 25 *Ex Parte* at 5, citing a requirement under Colorado law, 4 Colo. Code Regs. Sec. 723-41.2.3, which requires carriers to segregate a particular cost and collect it through "a line item on the monthly bill of each...end user."

requiring CMRS line items constitutes preempted rate regulation, we emphasize that this preemption does not affect other areas within the states' regulatory authority. For example, our ruling does nothing to disturb the states' ability to require CMRS carriers to contribute to state universal service support mechanisms or to impose other regulatory fees and taxes. The Commission previously has recognized that section 254(f) of the Act authorizes states to require CMRS providers to contribute to state universal service support mechanisms – and that section 332(c)(3) does not take this authority away.[89] Indeed, in distinguishing rate and entry regulations from "other terms and conditions," which are not expressly preempted under section 332, Congress explained that the latter includes "such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . or such other matters as fall within a state's lawful authority."[90] Similarly,

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[89] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9181-82, para. 791 (1997); *Pittencrieff Order*, 13 FCC Rcd 1735, *aff'd, CTIA v. FCC*.

[90] H.R. Rep. No. 111, 103d Cong., 1st Sess., at 261 (1993). The Commission previously has recognized that state regulation of customer billing practices fall within "other terms and conditions" in section 332(c)(3)(A). *See Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, WT Docket No. 00-239, Memorandum Opinion and Order, 17 FCC Rcd 14802, 14805, para. 6 (2002) (*Western Wireless Kansas Order*); *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, WT Docket No. 97-207, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 10861, 10881, para. 37 (1999) (*Calling Party Pays NPRM*). The Commission never has considered, however, where among section 332(c)(3)(A)'s key terms state

consistent with section 601(c)(2) of the 1996 Act, we do not read section 332(c)(3) to limit a state's authority to impose taxes or other regulatory fees.[91] What section 332(c)(3) does

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regulation prohibiting or requiring line items should fall. We address this issue for the first time in this item and, for the reasons expressed above, find that such regulation represents rate regulation. For similar reasons, our ruling here is not at odds with the decision of the Court of Appeals for the Seventh Circuit in *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004) (holding that challenge to wireless carrier's billing practice was not preempted by section 332(c)(3)(A) and thus not removable to federal court). The issue of state regulation of line items was not before that court, and we address it for the first time here. In addition, the *Fedor* court did not call into question the Commission's findings in the *Southwestern Bell Order* and the *Wireless Consumers Alliance Order*, which support our declaratory ruling here, and the *Fedor* court indeed relied on those decisions. Moreover, the court stated that, in deciding whether a billing-related claim is preempted, the proper inquiry was whether the claim requires the state court to assess what rate a carrier may charge. By addressing what may or may not be presented as part of a provider's rate, regulations of the sort we preempt here would directly affect what subscribers see as the provider's rates, which the Act expressly precludes the states from regulating.

[91] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). In particular, section 601(c)(2) of the 1996 Act provides, with limited exceptions, that "nothing in [the 1996] Act or the amendments made by [the 1996] Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation." 1996 Act, § 601(c)(2), published as a note to 47 U.S.C. § 152; *see also Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless*

address, however, in precluding state regulation of a CMRS carrier's rates, are rules that dictate whether and how CMRS carriers may incorporate these regulatory fees into their end user bills.

33. We also emphasize that not all regulation relating to a carrier's bills and its relationship with customers represents preempted "rate regulation." For example, state regulations that address the disclosure of whatever rates the CMRS provider chooses to set,[92] and the neutral application of state contractual or consumer fraud laws, are not preempted by section 332.[93] In addition, state requirements that are consistent with our federal truth-in-billing rules can coexist with these rules.[94] As with other types of state "truth in billing" regulation, however, regulation of interstate services that conflicts with federal rules and objectives may be subject

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Services; Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 12673 (1999).

[92] *See Southwestern Bell Order*, 14 FCC Rcd at 19908, para. 23.

[93] *See Southwestern Bell Order*, 14 FCC Rcd at 19903, para. 10; *Western Wireless Kansas Order*, 17 FCC Rcd at 14819, para. 30 n.119.

[94] *See* 47 C.F.R. § 64.2400(c); *see also Truth-in-Billing Order*, 14 FCC Rcd at 7507, para. 26 ("states will be free to continue to enact and enforce additional regulation *consistent with* the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today").

to future preemption. In the *Second Further Notice* that we adopt in this proceeding, we seek comment on, among other things, how to define more clearly prohibited and permissible state regulation pursuant to section 332(c)(3)(A).[95]

34. Our ruling is further consistent with and supported by the Commission's decision in the *Wireless Consumers Alliance Order*. In that decision, the Commission found that state court damage awards do not necessarily fall within the concept of "rates" in section 332(c)(3)(A) because "there is no necessary correspondence between the indirect effect that monetary liability may have on a company's behavior and the direct effect that a statute or regulatory rate requirement will have on that behavior."[96] Here, however, we find that state regulation requiring or prohibiting the use of line items representing charges for CMRS is preempted because of its direct effect on the CMRS carrier's rates and rate structure. The Commission further stated in the *Wireless Consumers Alliance Order* that state damage awards "may, in specific cases, be preempted by section 332[(c)(3)(A)]."[97] As we found in the *Wireless Consumers Alliance Order*, here we find that "it is the substance, not merely the form" of the line item at issue that determines whether the state is engaging in rate regulation proscribed by section 332(c)(3)(A).[98] Because "[w]e recognize that the line between prohibited and permissible" state regulations of line items "may not always be clear,"[99] we issue a *Second Further Notice* seeking comment on how further to define the scope of section

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[95] *See infra* paras. 49-54.

[96] *Wireless Consumers Alliance Order*, 15 FCC Rcd at 17034, para. 23.

[97] *Id.* at 17036, para. 28.

[98] *Id.* at 17037, para. 28.

[99] *Id.*

332(c)(3)(A)'s preemption, as well as in general on where to draw the line between the Commission's jurisdiction and states' jurisdiction over wireless and wireline carriers' billing practices.

35. Even setting aside the preemptive effect of section 332(c)(3), we note that the type of state regulations described above also may be subject to preemption because they conflict with established federal policies. It is recognized widely that federal law preempts state law where, as here, the state law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[100] or of federal regulations.[101] The pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers.[102] In this environment, Congress has directed that the rate relationship between CMRS providers and their customers be governed "by the mechanisms of a competitive marketplace," in which prospective rates are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators.[103] To succeed in this marketplace, CMRS carriers

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[100] *Fidelity Federal Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982).

[101] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *United States v. Shimer*, 367 U.S. 374, 381-382 (1961).

[102] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, Ninth Report, 19 FCC Rcd 20597, 20601, para. 4 (2004) (*Ninth CMRS Market Conditions Report*).

[103] *Wireless Consumers Alliance Order*, 15 FCC Rcd at 17032-33, paras. 20-21; *see Personal Communications Industry*

typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis.[104] Efforts by individual states to regulate CMRS carriers' rates through line item requirements thus would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. Moreover, there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans.

36. The preemption recognized above under the rate regulation provisions of section 332(c)(3)(A) is limited to state regulations that require or prohibit the use of line items. We thus decline in this *Declaratory Ruling* to go as far as urged by some CMRS carriers in the record, to the extent they suggest that *any* state regulation affecting line items is prohibited rate structure regulation.[105] We seek comment in

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Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review—Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers,* GN Docket No. 94-33, *GTE Petition for Reconsideration or Waiver of a Declaratory Ruling,* MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998).

[104] *Ninth CMRS Market Conditions Report,* 19 FCC Rcd at 20644, para. 113; *see also* CTIA Comments at 4-6.

[105] *See, e.g.*, Verizon Wireless Jan. 25 *Ex Parte* at 8-10; Letter from Leonard J. Kennedy, Senior Vice President and General

the *Second Further Notice* below regarding appropriate federal rules to govern, among other things, the description of line items, and we also ask questions about the balance between federal and state regulation on these subjects.

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. Introduction

37. In soliciting comment on the NASUCA Petition, we highlighted that the NASUCA Petition raised issues implicated in our Truth-in-Billing proceeding.[106] However, the broader issue of the role of states in regulating billing was addressed primarily in reply comments and *ex parte* submissions, and received only cursory treatment in comments on the NASUCA Petition. Given the importance and complexity of this broader issue, a second Further Notice of Proposed Rulemaking is appropriate in order to garner as complete and up-to-date a record as possible.[107] We also seek comment on other truth-in-billing issues, as specified below, and invite commenters to refresh the record on any issues from the *Truth-in-Billing Further Notice* that we have

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Counsel, Nextel Communications, and Thomas J. Sugrue, Vice-President, Government Affairs, T-Mobile USA, to Michael K. Powell, Chairman, Federal Communications Commission, et al., CG Docket No. 04-208, at 2, 10-11 (filed Dec. 13, 2004) (Nextel/T-Mobile Dec. 13 *Ex Parte*).

[106] National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format; Comments Requested, 69 Fed. Reg. 33021 (June 14, 2004).

[107] *But see* Verizon Wireless Jan. 25 *Ex Parte* at 11-14 (suggesting that this issue is ripe for resolution now and that Administrative Procedure Act requirements have been satisfied).

not addressed above.[108]

B. Discussion

1. Billing of Government Mandated and Non-Mandated Charges

38. In the *Truth-in-Billing Order,* the Commission required carriers that list charges in separate line items to identify certain of such line item charges through standard industry-wide labels and to provide full, clear and non-misleading descriptions of the nature of the charges.[109] The Commission sought comment on the specific labels that carriers should adopt, while tentatively concluding that such labels will, without unduly burdening carriers, identify adequately the charges and provide consumers with a basis for comparison among carriers.[110] In addition, while declining to formulate standardized descriptions for billed services, the Commission encouraged carriers to develop

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[108] For instance, while we do resolve above the *Truth-in-Billing Further Notice*'s question regarding whether 47 C.F.R. § 64.2401(b) should apply to CMRS carriers, *see Truth-in-Billing Further Notice,* 14 FCC Rcd at 7534-35, paras. 68-69, we do not decide above, however, whether 47 C.F.R. § 64.201(a)(2) and (c) should apply in the wireless context. *See Truth-in-Billing Further Notice,* 14 FCC Rcd at 7535-36, para. 70. We invite commenters to refresh the record on these issues.

[109] *See Truth-in-Billing Order and Further Notice,* 14 FCC Rcd at 7522-23, 7525-26, paras. 50, 55.

[110] *See id.* at 7537, para. 71. We will address these issues in the order that we adopt in response to this *Truth-in-Billing Second Further Notice.* Given that it has been over five and a half years since the comment cycle on the *Truth-in-Billing Further Notice* closed, we encourage commenters to refresh the record on these issues.

uniform terminology for such descriptions.[111] The Commission also encouraged industry and consumer groups to consider further whether some categorization of charges would be advisable.[112]

39. Nearly six years after adoption of the *Truth-in-Billing Order*, the record reflects that consumers still experience a tremendous amount of confusion regarding their bills,[113] which inhibits their ability to compare carriers' service and price offerings, in contravention of the pro-competitive framework of the 1996 Act. To help alleviate this situation, consistent with our prior finding,[114] as well as the recommendations of commenters such as the Ohio PUC,[115] we tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges. We also solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes.

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[111] *See Truth-in-Billing Order*, 14 FCC Rcd at 7518-19, para. 43.

[112] *See id.* at 7526, para. 55. The Commission provided as an example one method that carriers may use to provide clear descriptions of services rendered would be to identify a section of the telephone bill as "long distance service," followed by an itemized description of calls. *See id.* at 7517-18, para. 41.

[113] *See supra* paras. 16 and 24; *but see* Verizon Wireless Jan. 25 *Ex Parte* at 6 n.27 (asserting that the record in this proceeding "contains no credible evidence that CMRS providers fail to provide consumers with clear and non-misleading information they need to make informed choices").

[114] *See supra* para. 27.

[115] *See generally, e.g.*, Ohio PUC Comments at 2.

a. Distinction Between Mandated and Non-Mandated

40. We solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes. Should we define government "mandated" charges as amounts that a carrier is *required* to collect directly from customers, and remit to federal, state or local governments? Under this definition, some examples of mandated charges would include state and local taxes, federal excise taxes on communication services,[116] and some state E911 fees. Non-mandated charges then could be defined as comprised of government authorized but discretionary fees, which a carrier must remit pursuant to regulatory action but over which the carrier has discretion whether and how to pass on the charge to the consumer. Under this definition, some examples of non-mandated, government authorized but discretionary charges would include state Telecommunications Relay Service[117] and universal service charges.[118] Another form of non-mandated charges also would include administrative fees and other purely discretionary charges.[119] We believe that these definitions

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[116] *See* 26 U.S.C. § 4251.

[117] *See supra* note 64.

[118] Government authorized but discretionary charges only could include those costs that are directly related to the specific governmental program or action that the line item purports to recover. *See supra* para. 26.

[119] Though carriers may recover such costs, we emphasize that carriers may not include such costs in the line item purporting to recover costs directly related to the specific underlying governmental program or action. For example, while carriers may recover administrative and other costs related to collection of universal service charges from end users, carriers may not include

would be consistent with the settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS,[120] and with our precedents. For instance, discussing the universal service charge in the *Truth-in-Billing Order*, the Commission stated:

> [W]e would not consider a description of that charge as being "mandated" by the Commission or the federal government to be accurate. Instead, it is the carriers' business decision whether, how, and how much of such costs they choose to recover directly from consumers through separately identifiable charges. Accordingly, to state or imply that the carrier has no choice regarding whether or not such a charge must be included on the bill . . . would be misleading.[121]

Similarly, after discussing carrier imposition of line items for charges such as access charge recovery and universal

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such costs as part of a line item for "regulatory fees or universal service charges." *See supra* para. 28.

[120] *See, e.g.*, Verizon AVC at 14, para. 36(a), stating that on consumers' bills, carriers will separate "taxes, fees, and other charges that [carriers are] required to collect directly from Consumers and remit to federal, state, or local governments . . . from . . . all other discretionary charges (including, but not limited to, Universal Service Fund fees)."

[121] *Truth-in-Billing Order*, 14 FCC Rcd at 7527, para. 56 (citations omitted). The Commission further noted that its view was consistent with the then-recent decision of the Federal-State Joint Board on Universal Service recommending that the Commission "'prohibit carriers from depicting [universal service] charges as . . mandated by the Commission or the federal government by terms or placement on the bill.'" *Id.* (citations omitted).

service, the Commission expressed concern that consumers may be confused about the nature of these charges, because the "names associated with these charges as well as accompanying descriptions (or entire lack thereof) may convince consumers that all of these fees are federally mandated."[122]

41. Another possible distinction between government mandated and non-mandated charges could be based on whether the amount listed is remitted directly to a governmental entity or its agent.[123] Pursuant to this distinction, "mandated" charges would differ from non-mandated ones in that non-mandated charges only would be composed of fees collected by carriers that go to the carrier's coffers, and which are not directly related to any regulatory action or government program. For example, under this definition, a charge to recover universal service contributions would be considered to be government "mandated," though a line item charge for administrative and other costs related to collection of universal service charges from end users still would be considered non-mandated. We observe that this proposed distinction is consistent with that in the CTIA Consumer Code, which states that on customers' bills, carriers will distinguish "(a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees, and other charges collected by the carrier and remitted to federal, state or local governments."[124]

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[122] *Id.* at 7524-25, para. 53.

[123] Charges also would be considered mandated if the government required that the funds be remitted to a quasi-governmental authority such as the Universal Service Administrative Company.

[124] CTIA Consumer Code, Item Six.

42. We seek comment on these potential distinctions between government mandated and non-mandated charges that we have set forth, as well as any others that commenters may wish to propose. It would be helpful if commenters indicate how whatever proposal they support is in accord with our truth-in-billing policy goals and other policy considerations, and if they address how whatever distinction and definitions they advocate comport with Commission precedents and/or industry efforts to address billing and other consumer issues. We also encourage commenters to assess the ease or difficulty of administering any proposed distinction between government mandated and non-mandated charges.

b. Separate Section for Government Mandated Charges

43. Section 64.2400(a) of the Commission's rules provides that our truth-in-billing rules are intended "to aid customers in understanding their telecommunications bills, and to provide them with the tools they need to make informed choices in the market for telecommunications service."[125] Section 64.2401(b) requires that descriptions of billed charges be brief, clear, non-misleading, and in plain language.[126] The Commission adopted these rules in the *Truth-in-Billing Order*, where it elaborated that the "proper functioning of competitive markets . . . is predicated on consumers having access to accurate, meaningful, information in a format that they can understand."[127] The

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[125] 47 C.F.R. § 64.2400(a). *See also Truth-in-Billing Order*, 14 FCC Rcd at 7493, para. 1; 7523, para. 50.

[126] *See* 47 C.F.R. § 64.2401(b). In the *Order* above, we explicitly apply the requirements of 47 C.F.R. § 64.2401(b) to CMRS carriers. *See supra* paras. 16-19.

[127] *Truth-in-Billing Order*, 14 FCC Rcd at 7494, para. 2. *See also id.* at 7498, para. 8; 7519, para. 43 ("Adopting understandable

Commission further emphasized that one of the fundamental goals of the truth-in-billing principles is "to provide consumers with clear, well-organized, and non-misleading information so that they may be able to reap the advantages of competitive markets."[128] We believe that separating government mandated charges from all other charges satisfies all of these policy goals, and will strike a balance between some carriers' desires to explain that they incur costs associated with government programs, and the needs of consumers and regulators to assess bills accurately. At the same time, such separation will discourage a carrier from misleading consumers by recovering other operating costs as government mandated charges. We also note that the proposed rule is consistent with the relevant obligations of the aforementioned settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS,[129] and Verizon, Nextel and T-Mobile have acknowledged that separating taxes and other government mandated fees from non-mandated line items is appropriate.[130] We seek comment on the merits of our

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common descriptions for services offered could enable consumers to comparison shop more readily, and thereby take full advantage of the benefits of a competitive telecommunications market").

[128] *Id.* at 7501, para. 14. *See also id.* at 7498, para. 7.

[129] *See, e.g.*, Verizon AVC at 14, para. 36.

[130] *See* Nextel/T-Mobile Dec. 13 *Ex Parte* at 6 (asserting that the CTIA Consumer Code already calls for separation of government mandated and non-mandated charges on bills); Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 04-208 and CC Docket No. 98-170, at 2 (filed Dec. 2, 2004) (Verizon Wireless Dec. 2 *Ex Parte*) (emphasizing efforts of Verizon Wireless and the wireless industry to address "commingling" of taxes and non-mandated fees, and misleading descriptions).

tentative conclusion regarding placement on bills of government mandated charges in a section separate from all other charges.

c. Other Considerations

44. We seek further comment on the mechanics of placing government mandated fees and taxes in a section of a bill separate from all other charges, and we recognize that some of these specifics may depend largely on how we distinguish ultimately between government mandated and non-mandated charges. Should a bill only separate government mandated from non-mandated charges,[131] or should it require separation of categories of charges beyond merely government mandated and non-mandated? In addition, should the labeling of such categories of charges be subject to imperative national uniformity, and if so, what should these categories be called?

45. As for our proposal for standardized labeling of categories of charges, we seek comment on whether the First Amendment provides any legal impediment. We found in the *Truth-in-Billing Order* that so long as we do not mandate or limit specific language that carriers utilize in their descriptions of the charges, standardized labels would not violate the First Amendment.[132] As discussed above,[133] both as a matter of First Amendment law[134] and as a matter of

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[131] *See, e.g.*, California PUC Comments at 2.

[132] *See Truth-in-Billing Order*, 14 FCC Rcd at 7530, para. 60.

[133] *See supra* para. 3.

[134] *See Truth-in-Billing Order*, 14 FCC Rcd at 7530-32, paras. 60-63.

policy,[135] our focus in this *Second Report and Order, Declaratory Ruling, and Second Further Notice* is to ensure that bills are not misleading, such that consumers can make informed decisions on carriers based on pricing and services, in furtherance of the pro-competitive goals of the 1996 Act. Do our labeling proposals address satisfactorily these legal and policy considerations? Are there any other potential legal impediments, such as interstate and intrastate jurisdictional issues, in light of the *Truth-in-Billing Order*'s foundation in sections 201(b) and 258 of the Act? What separate role, if any, should states have with respect to labeling and determining what labels and descriptions are misleading?[136] If we establish national rules, can we have states enforce them?[137]

46. We additionally seek comment on what the pragmatic considerations are in assessing whether we should require standardized labeling of categories of charges. What would be the monetary costs of such a requirement? We

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[135] *See, e.g., id.* at 7498, para. 7 ("our [truth-in-billing] principles and guidelines will protect consumers from misleading and inaccurate billing practices").

[136] *See, e.g.*, Minnesota DOC Comments at 2: "The Commission should recognize that states are in some cases the appropriate venues in which to handle misleading surcharges and fees . . . [and] that states play an important role in enforcing consumer protections." The Minnesota DOC acknowledges that state jurisdiction over interexchange and wireless carriers "is limited concerning the practices complained of in the NASUCA petition," and urges the Commission to step in and prohibit misleading charges. *Id.* at 3. Nevertheless, the Minnesota DOC expresses that any Commission decision on the NASUCA Petition would apply only to interstate service, and would merely "assist states" in evaluating intrastate charges. *Id.* at 4.

[137] *See also infra* paras. 51 and 57.

encourage commenters to address this issue with utmost specificity, such as data on how many bills they generate per month, a description of what billing systems would have to be changed, and what the estimated costs of such changes would be for the number of bills they generate. We particularly seek comment on the nature of the economic impact of such a requirement on small entities, and whether the proposed requirement should be applied to them in any manner different from its application to entities that do not qualify as small entities.[138] We also welcome comment on a comparison of such costs with current costs of compliance with any state-specific billing category labeling requirements.

47. Finally, consistent with our emphasis here on ensuring that consumers' bills are not misleading and that carriers do not misleadingly invoke government requirement or sanction of certain line items, we seek comment on whether it is misleading for carriers to include expenses such as property taxes, regulatory compliance costs, and billing expenses in line items labeled such as "regulatory assessment fees" or "universal connectivity charge."[139] For instance, is it misleading to include billing expenses -- which at best are related tangentially to regulation – in a line item called "regulatory assessment fee"? Similarly, given that property taxes are not related to regulation under the Act of a telecommunications company's provision of services, is it misleading to include such taxes in a "regulatory assessment fee"? In addition, we seek comment on whether surcharges identified as "regulatory assessment fees" or "cost recovery charges" are sufficiently clear and specific enough to comply

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[138] *See infra* Appendices B and C for a discussion of what constitutes a "small entity."

[139] *See supra* n.32.

with the requirements of section 64.2401(b) of our rules.[140]

2. Combination of Federal Regulatory Charges in Line Items

48. In the *Truth-in-Billing Further Notice*, the Commission sought comment on how carriers should identify line items that combine two or more federal regulatory charges into a single charge.[141] However, in the *Truth-in-Billing Order*, the Commission also expressed concern that where regulatory-related charges are not broken down into line items, it facilitates carriers' ability to bury costs in lump figures.[142] In light of these conflicting considerations, as well as the record developed in response to the NASUCA Petition,[143] we now refine our proposal to seek comment on whether it is unreasonable under section 201(b) of the Act for line items to combine federal regulatory charges.[144]

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[140] *See, e.g.*, NASUCA Petition at 10-23, noting other examples of surcharges identified as "regulatory charge," "regulatory programs fee," "regulatory cost recovery fee," and "telecom connectivity fee."

[141] *See Truth-in-Billing Further Notice*, 14 FCC Rcd at 7537, para. 71.

[142] *See Truth-in-Billing Order*, 14 FCC Rcd at 7526, para. 55.

[143] *See, e.g.*, Global Crossing Comments at 2; MCI Comments at 5; RCA Comments at 8; NASUCA Reply at 16-21; SBC Reply at 4.

[144] Our proposal is limited to federal regulatory charges, and not state-specific ones, due to the limitations of our jurisdiction over labels involving exclusively intrastate services, pursuant to section 201(b) of the Act. *See Truth-in-Billing Order*, 14 FCC Rcd at 7503-04, 7522, paras. 21, 49. Any commenter who still believes that carriers should be able to combine two or more of these charges into a single charge is welcome to refresh the record on

3. Preemption of Inconsistent State Regulation

49. As we have found in the *Declaratory Ruling,* state regulations requiring or prohibiting line items for CMRS bills are preempted rate regulation pursuant to section 332(c)(3)(A) of the Act.[145] Nevertheless, in the *Truth-in-Billing Order,* we allowed that "states will be free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today."[146] Primarily in *ex parte* submissions,[147] wireless carriers have argued that there are other bases for the Commission to preempt state regulation of carriers' billing practices, and that a change in course from our pronouncement in the *Truth-in-Billing Order* regarding states' roles in regulating carriers' billing practices is necessary to stem an onslaught of state regulation that is making nationwide service more expensive for carriers to provide and raising the cost of service to consumers.[148]

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how carriers should identify such line items. *See Truth-in-Billing Further Notice,* 14 FCC Rcd at 7537, para. 71.

[145] *See supra* Section IV.B.3.

[146] *Truth-in-Billing Order,* 14 FCC Rcd at 7507, para. 26.

[147] *But see also* Leap Comments at 16-18; Nextel Comments at 35-47.

[148] *See* Nextel/T-Mobile Dec. 13 *Ex Parte* and Verizon Wireless Jan. 25 *Ex Parte* at 3-11 (citing, *e.g.*, a Minnesota statute, regulatory actions in Colorado and Indiana, and proposed regulatory actions in New Mexico and Vermont). *See also* NASUCA Petition at 65 n.170, citing a Georgia statute that NASUCA describes as prohibiting recovery of carrier contributions to the state universal service fund through separate surcharges.

Moreover, these bases are necessary if we are to preempt state regulation of the billing practices of other carriers, such as IXCs, because section 332 of the Act does not apply to such wireline carriers.

50. We tentatively conclude that one or more of the theories discussed below provide additional support for our preemption of state billing practices regulations that are inconsistent with our truth-in-billing rules, guidelines, and principles. As we discuss herein, there are clearly discernible federal objectives that may be undermined by states' "non-rate" regulation of CMRS carriers' billing practices. Thus, Verizon Wireless, and Nextel and T-Mobile, argue that the Commission should preempt state regulation that conflicts with the Commission's pro-competitive federal scheme for truth-in-billing regulation under the Act.[149] We seek comment on whether we should preempt under the Act state regulation of CMRS carriers' billing practices, beyond the 'line item' regulations that we recognize in the *Declaratory Ruling* above. In addition, to what degree can such "conflict preemption" be applied to *all* carriers under the provisions of the Act and other policy frameworks? Verizon Wireless, and Nextel and T-Mobile, also suggest that requiring wireless carriers to satisfy 50 different states' sets of rules relating to consumer disclosures and the details on bills would stifle the further development of wireless competition and unreasonably burden interstate commerce, in contravention of the U.S. Constitution's Commerce Clause.[150] Furthermore, Leap asserts that sections 201(b) and 205(a) of

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[149] *See* Nextel/T-Mobile Dec. 13 *Ex Parte* at 2, 12-14, 16 (citing *City of New York*, 486 U.S. at 69, in which the Supreme Court asserted the "Commission's own power to pre-empt"); Verizon Wireless Jan. 25 *Ex Parte* at 5-7, 10-11, 14.

[150] *See* Nextel/T-Mobile Dec. 13 *Ex Parte* at 15; Verizon Wireless Jan. 25 *Ex Parte* at 4.

the Act give the Commission "express preemptive authority over state regulatory agencies with respect to prescribing billing format and content, including line-item charges."[151] We also seek comment on the merits of these other potential bases for Commission preemption of state regulation of carriers' billing practices.

51. In light of our tentative conclusion that other bases exist for the Commission to preempt state regulation of carriers' billing practices, we tentatively conclude that we should reverse our prior pronouncement that states may enact and enforce more specific truth-in-billing rules than ours. We solicit comment on this further tentative conclusion. In addition, we seek comment on, if we do adopt this further tentative conclusion, whether we should limit the scope of what constitutes "consistent truth-in-billing requirements by the states" under 47 C.F.R. § 64.2400(c), eliminate section 64.2400(c) from our rules altogether, or adopt an enforcement regime where states are permitted to enforce rules developed by the Commission.[152]

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[151] Leap Comments at 17 (citing 47 U.S.C. §§ 201(b), 205(a)). Section 205(a) provides in relevant part that "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable. . . ." Leap adds that whether carriers can include separate line items associated with regulatory action on their bills is a "practice, classification, or regulation" under the Commission's express authority. *See* Leap Comments at 17.

[152] *See, e.g.*, 47 C.F.R. § 64.1110. In this example, our rules against "slamming," which is an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service, provide that state commissions may elect to administer our slamming rules. In adopting these rules, however, the Commission recognized that not all states have the resources to resolve slamming complaints, or may not choose to

52. We believe that limiting state regulation of CMRS and other interstate carriers' billing practices, in favor of a uniform, nationwide, federal regime, will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers. Accordingly, we ask commenters to address the proper boundaries of "other terms and conditions" under section 332(c)(3)(A) of the Act,[153] and generally to delineate what they believe should be the relative roles of the Commission and the states in defining carriers' proper billing practices. Nextel and T-Mobile, for instance, argue that we should provide that any rules we propose governing line item charges are intended to "occupy the field and preclude additional state regulation," whether such regulation constitutes "rate and entry" regulation or regulation of "other

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take on such primary responsibility for administering them, so the Commission also adopted rules allowing consumers in those states to file slamming complaints with the Commission. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes to Consumers Long Distance Carriers*, CC Docket No. 94-129, Corrected Version First Order on Reconsideration, 15 FCC Rcd 8158, 8169-80, paras. 22-43 (2000).

[153] The House Report stated that "other terms and conditions" under section 332(c)(3)(A) include "such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . or such other matters as fall within a state's lawful authority," H.R. Rep. No. 111, 103d Cong., 1st Sess., at 261, and the Commission previously has recognized that under the "other terms and conditions" clause, states have a "legitimate interest . . . to regulate matters concerning aspects of consumer protection involved, *e.g.*, in customer billing practices." *Calling Party Pays NPRM*, 14 FCC Rcd at 10881, para. 37.

terms and conditions" relating to line item charges.[154] They add that the CTIA Consumer Code should be adequate to occupy the field.[155] We seek comment on whether the other items of the CTIA Consumer Code not already addressed in this *Second Further Notice*[156] are enough to occupy the field, to the extent we occupy it.

53. In the alternative, Nextel and T-Mobile contend that in adopting section 332(c)(3)(A) of the Act, "Congress did not *preserve* state authority over 'other terms and conditions' of wireless service, but merely made clear that by preempting rate and entry regulation it was not prohibiting state regulation of other matters."[157] Thus, they maintain, the Commission should interpret the phrase "other terms and conditions" narrowly. They rely on the Commission's decision in the *Southwestern Bell Order*, citing it for the proposition that states may not prescribe the rate elements for CMRS, and thus may properly enforce only state contractual

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[154] Nextel/T-Mobile Dec. 13 *Ex Parte* at 11. *See also id.* at 12; Verizon Wireless Jan. 25 *Ex Parte* at 14 (asserting that the Commission should declare that section 332(c)(3)(A) and 47 C.F.R. § 64.2400(c) "bar all state regulation of CMRS billing line items, as well as billing regulations that are inconsistent with the Commission's rules").

[155] *See* Nextel/T-Mobile Dec. 13 *Ex Parte* at 2, 6-7 (citing *Virginia Cellular, LLC, Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, 19 FCC Rcd 1563 (2004) for the proposition that the Commission should wait and see whether regulation is warranted in light of industry's voluntary steps to improve service).

[156] *See supra* paras. 39-44 regarding separation of mandated charges from carrier charges.

[157] Nextel/T-Mobile Dec. 13 *Ex Parte* at 2 (emphasis in original). *See also id.* at 12; Verizon Wireless Jan. 25 *Ex Parte* at 3 n.10.

or consumer fraud laws of neutral application.[158] On the other hand, NASUCA argues that "other terms and conditions" under section 332(c)(3)(A) includes state regulation of billing and advertising practices, which "is not a regulation of the carriers' charges".[159] In accord with our precedents, we tentatively conclude that the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices. We emphasize that our tentative conclusion does not limit a state's ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must contribute. Furthermore, we believe that states' enforcement of their own generally applicable contractual and consumer protection laws – to the extent such laws do not require or prohibit the use of line items -- would not constitute rate regulation under section 332(c)(3)(A).[160] However, states would be preempted from enacting and enforcing specific truth-in-billing rules beyond the rules, guidelines, and principles that the Commission has adopted, and that we may adopt in an order responsive to this *Second Further Notice*. We seek comment on these tentative conclusions.

54. We also solicit comment on the practical reach of the line that we tentatively delineate between the

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[158] Nextel/T-Mobile Dec. 13 *Ex Parte* at 5-6 (citing *Southwestern Bell Order*, 14 FCC Rcd at 19903, 19907, paras. 10, 20). They also cite the *Wireless Consumers Alliance Order*, 15 FCC Rcd at 17034, para. 24, in which the Commission upheld the application to the wireless industry of state laws of general applicability barring misrepresentation and breach of contract.

[159] NASUCA Reply at 14-15, 56-57.

[160] *See supra* Section IV.B.3.

Commission's jurisdiction and states' jurisdiction over carriers' billing practices. For instance, Verizon Wireless cites New Mexico regulations that Verizon Wireless claims effectively bar carriers from including non-communications services on bills.[161] It also cites a California regulation that permits carriers to include non-communications services on bills, but requires them to place charges for such services in one or more separate sections of the telephone bill clearly labeled "Non-communications-related charges."[162] Pursuant to the jurisdictional line that we delineate, do such protections against "cramming"[163] properly fall within the Commission's jurisdiction, or within states' jurisdiction? Finally, we ask that commenters address what affect our tentative delineation between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices would have on competition, both intermodal and intramodal.

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[161] *See* Verizon Wireless Jan. 25 *Ex Parte* at 7 (citing N.M. Admin. Code tit. 17, §§ 13.7.6.2 and 13.9.3).

[162] *See* Verizon Wireless Jan. 25 *Ex Parte* at 7 (citing California PUC Rule Part 4, H(2) of General Order No. 168). Though the California PUC has stayed its order establishing consumer protection rules governing telephone and wireless marketing and sales practices, it stated that "[i]n no way" does the stay impact the PUC's enforcement of the existing interim rules governing billing for non-communications-related charges, of which the substance of Rule Part 4, H(2) is part. *See Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Order Modifying Decision 04-05-057, California PUC Decision 05-01-058, at 4 (rel. Jan. 27, 2005).

[163] Cramming is the submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on subscribers' telephone bills.

4. Point of Sale Disclosure

55. The settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS contain numerous provisions obligating the carriers to disclose material rates and terms of service at the point of sale, whether that is at the carrier's retail location, via the carrier's website, or during a telephone conversation between the carrier and a consumer.[164] Furthermore, we note that some carriers independently have expressed support for point of sale disclosure rules.[165] In accord with these agreements, and in order to ensure that these obligations apply nationwide to all carriers, we tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale. For instance, providing only a wide range of potential surcharges at the point of sale could be misleading.[166] In this regard, would actual government mandated surcharges in excess of 25 percent greater than estimated government mandated surcharges be misleading?

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[164] *See, e.g.*, Verizon AVC at 5-9, paras. 17-23.

[165] *See, e.g.*, Verizon Wireless Dec. 2 *Ex Parte* at 2

[166] *See, e.g.*, NJ Comments at 3 (stating that additional charges can increase consumers' bills by nearly 50 percent over the advertised rate); OPCDC Comments at 9-10 (maintaining that in many instances, consumers must pay 20 to 30 percent more than originally quoted by a carrier's customer service representative); and TracFone Reply Comments at 6 (contending that the average wireless consumer spends $17.75 per month above the advertised price of the monthly plan; "Most of these additional amounts are attributable to line items on carrier bills – charges not explained to the customers prior to signing service agreements"). We seek comment on what constitutes a reasonable estimate of government mandated surcharges at the point of sale.

Would it be misleading if such actual surcharges were in excess of 10 percent greater than such estimated surcharges?

56. We further tentatively conclude that such disclosure at the point of sale must occur *before* the customer signs any contract for the carrier's services. We believe that a disclosure after contract signing, when most CMRS carriers lock customers into long-term contracts subject to significant early termination fees, may thwart our pro-competition goal of enabling consumers to make informed comparisons of different carriers' plans before subscribing.[167] We seek comment on our tentative conclusions regarding point of sale disclosures. We also seek comment on whether the aforementioned provisions of the settlement agreements between Attorneys General from 32 states and Verizon Wireless, Cingular Wireless, and Sprint PCS establish an appropriate framework for any point of sale disclosure rules that we may adopt; and, if not, how the terms of the settlement agreements should be amended, or why we should refrain from codifying these provisions in the first place. We particularly seek comment on the effect of these tentative conclusions on small entities, and on whether it would be appropriate to apply whatever provisions we adopt to small entities in the same manner that we apply them to entities that do not qualify as small.[168]

57. Finally, we solicit comment on whether we should adopt an enforcement regime where states are permitted to

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[167] We also believe that disclosure prior to contract signing is consistent with the terms of the settlement agreements, which provide that "Carrier shall *during a Sales Transaction* . . . disclose clearly and conspicuously to Consumers all material terms and conditions of the offer *to be purchased*." Verizon AVC at 5, para. 17 (emphasis added).

[168] *See infra* Appendices B and C for a discussion of what constitutes a "small entity."

enforce rules developed by the Commission regarding point of sale disclosures. For example, our rules against slamming provide that state commissions may elect to administer our slamming rules. In adopting these rules, however, the Commission recognized that not all states have the resources to resolve slamming complaints, or may not choose to take on such primary responsibility for administering them, so the Commission also adopted rules allowing consumers in those states to file slamming complaints with the Commission.[169] In this regard, we ask whether our slamming rules provide a good model for rules that we may develop for point of sale disclosures. If we adopt an enforcement regime akin to that in our slamming rules, should we also establish rules prescribing specific penalty amounts and procedures for point of sale disclosure violations, like the penalty provisions in our slamming rules?[170] We encourage commenters to address how states can administer the process of any penalty scheme that we establish.

VI. PROCEDURAL ISSUES

A. Ex Parte Presentations for Second Further Notice of Proposed Rulemaking

58. This proceeding shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules, 47 C.F.R. § 1.1200 *et seq*. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-

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[169] *See supra* n.152.

[170] *See, e.g.*, 47 C.F.R. §§ 64.1140-70.

disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

B. Paperwork Reduction Act

59. The *Second Report and Order* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

60. In this present document, we conclude that CMRS carriers should no longer be exempt from 47 C.F.R. § 64.2401(b) – requiring that billing descriptions be brief, clear, non-misleading and in plain language. To the extent that any CMRS carrier is not currently in compliance with this requirement, certain modifications to the carrier's billing practices may be required.

61. In addition, the *Second Further Notice of Proposed Rulemaking* contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements proposed in this *Second Further Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due 60 days after the date of publication of this *Second Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden

of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Congressional Review Act

62. The Commission will send a copy of this *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Filing of Comments and Reply Comments

63. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments in this proceeding on or before the **30th** day after publication of this *Second Further Notice of Proposed Rulemaking* in the Federal Register, and reply comments may be filed on or before the **60th** day after publication of this *Second Further Notice of Proposed Rulemaking* in the Federal Register. When filing comments, please reference CC Docket No. 98-170 and CG Docket No. 04-208. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address,

and the applicable docket or rulemaking number(s). Parties also may submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

64. Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Room TW-B204, Washington, DC 20554.

65. The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC

20554, (202) 418-0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their web site: www.bcpiweb.com or by calling 1-800-378-3160.

E. Accessible Formats

66. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking* also can be downloaded in Word and Portable Document Format (PDF) at http://www.fcc.gov/cgb/policy.

F. Regulatory Flexibility Analysis

67. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[171] the Commission's Final Regulatory Flexibility Analysis regarding the *Second Report and Order* is attached as Appendix B.

G. Initial Regulatory Flexibility Analysis

68. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[172] the Commission's Initial Regulatory Flexibility Analysis regarding the *Second Further Notice of Proposed Rulemaking* is attached as Appendix C.

VII. ORDERING CLAUSES

69. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201, 202, 206-208, 258,

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[171] 5 U.S.C. §§ 601 *et seq.*

[172] 5 U.S.C. §§ 601 *et seq.*

303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 206-208, 258, 303(r), and 332; section 601(c) of the Telecommunications Act of 1996; and sections 1.421, 64.2400 and 64.2401 of the Commission's Rules, 47 C.F.R. §§ 1.421, 64.2400, and 64.2401, the SECOND REPORT AND ORDER, DECLARATORY RULING, AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING ARE ADOPTED, and Part 64 of the Commission's rules, 47 C.F.R. § 64.2400, IS AMENDED as set forth in Appendix A.

70. IT IS FURTHER ORDERED that the rules and requirements contained in this *Second Report and Order* and in Appendix A attached hereto SHALL BECOME EFFECTIVE within 90 days of their publication in the Federal Register.

71. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by the National Association of State Utility Consumer Advocates on March 30, 2004, IS DENIED to the extent provided herein.

72. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, including the Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

Rule Change

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

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Subpart Y – Truth-in-Billing Requirements for Common Carriers

2. Section 64.2400(b) is revised to read as follows:

§ 64.2400 Purpose and scope.

(a) * * *

(b) These rules shall apply to all telecommunications common carriers, except that §§64.2401(a)(2) and 64.2401(c) shall not apply to providers of Commercial Mobile Radio Service as defined in §20.9 of this chapter, or to other providers of mobile service as defined in §20.7 of this chapter, unless the Commission determines otherwise in a further rulemaking.

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SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[173] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rulemaking released by the Federal Communications Commission (Commission) on May 11, 1999.[174] The Commission sought written public comments on the proposals contained in the *FNPRM*, including comments on the IRFA. Comments filed in this proceeding specifically identified as comments addressing the IRFA and comments that address the impact of the proposed rules and policies on small entities are discussed below. The 1999 *Truth-in-Billing Order and Further Notice* included a Final Regulatory Flexibility Analysis (FRFA) that conformed to the RFA.[175] This present supplemental FRFA addresses only the modification to section 64.2400(b) of our rules adopted in this Second Report and Order, and conforms to the RFA.[176]

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[173] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[174] *See Truth-in-Billing and Billing Format*, CC Docket No.98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd at 7550-52 at paras. 105-111.

[175] *Truth-in-Billing Order*, 14 FCC Rcd at 7537-7550, paras. 72-103.

[176] *See* 5 U.S.C. § 604. The requirements of the RFA do not extend to the issues set forth in the Declaratory Ruling. Thus, we do not address those issues herein.

A. Need for, and Objectives of, the Order

2. In a 1999 Further Notice of Proposed Rulemaking, the Commission sought comment on whether the truth-in-billing rules adopted in the wireline context should apply to CMRS carriers in order to protect consumers.[177] In the 1999 *Truth-in-Billing Order*, the Commission concluded that the broad principles adopted to promote truth-in-billing should apply to all telecommunications carriers, both wireline and wireless.[178] The Commission noted that these principles represent fundamental statements of fair and reasonable practices. In the wireline context, the Commission incorporated these principles and guidelines into rules for enforcement purposes "after considering an extensive record of both the nature and volume of customer complaints, as well as substantial information about wireline billing practices."[179]

3. In the wireless context, however, the Commission found that the record at that time did not reflect the same high volume of customer complaints nor did the record indicate that CMRS billing practices failed to provide consumers with the clear and non-misleading information they need to make informed choices.[180] The Commission

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[177] *Truth-in-Billing Order*, 14 FCC Rcd at 7535-36, paras. 68-70.

[178] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 13 ("[l]ike wireline carriers, wireless carriers also should be fair, clear, and truthful in their billing practices.").

[179] *Truth-in-Billing Order*, 14 FCC Rcd at 7501, para. 15.

[180] *Truth-in-Billing Order*, 14 FCC Rcd at 7502, para. 16. The Commission also noted that notwithstanding the decision not to apply these guidelines to CMRS providers, that such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202, "and our decision here in no

therefore exempted CMRS carriers from the truth-in-billing rule that requires charges contained on telephone bills to be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered.[181] We believe that making the requirements of 47 C.F.R. § 64.2401(b) mandatory for CMRS will help to ensure that wireless consumers receive the information that they require to make informed decisions in a competitive marketplace.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.

4. The Office of Advocacy filed comments specifically addressing the proposed rules and policies presented in the 1999 *Truth-in Billing Order* FRFA and IRFA.[182] In general, the Office of Advocacy argued that the Commission's FRFA and IRFA's were flawed due to vagueness. As the Commission has previously stated, however, we believe the *Truth-in-Billing Order* and regulatory flexibility analysis contained therein appropriately considered and balanced the concerns of carriers that detailed rules may increase costs against our goal of protecting consumers from fraud.[183] Moreover, we note that the scope of this Second Report and Order is significantly more limited than the 1999 *Truth-in-Billing Order* and the issues that Office of Advocacy addressed in its comments. The majority

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way diminishes such obligations as they may relate to billing practices of CMRS carriers." *See Truth-in-Billing Order*, 14 FCC Rcd at 7502, para. 19.

[181] *See* 47 C.F.R. §§ 64.2400(b), 64.2401(b).

[182] *See, e.g.* Office of Advocacy, U.S. Small Business Administration 1999 Reply Comments;

[183] *Truth-in-Billing Order on Reconsideration*, 15 FCC Rcd at 6031, para. 20.

of commenters addressing the limited issue presented in the Second Report and Order, representing primarily CMRS providers, responded that the lack of billing complaints against wireless providers along with the competitive nature of the wireless industry should indicate that it is not necessary to apply these rules to CMRS.[184] Several state commissions, consumer organizations, and individual commenters, however, argued that many consumers were confused by their telephone bills including charges included on their CMRS bills.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[185] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[186] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[187] Under the Small Business Act, a "small business

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[184] *See, e.g.*, Bell Atlantic Mobile 1999 Comments at 3; CTIA 1999 Comments at 5; PCIA 1999 Comments 4-5;

[185] 5 U.S.C. § 604(a)(3).

[186] 5 U.S.C. § 601(6)

[187] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comments, establishes one or more definitions of such term which are appropriate to the activities of

concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) satisfies any additional criteria established by the Small Business Administration (SBA).[188]

6. **Wireless Service Providers.** The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[189] and "Cellular and Other Wireless Telecommunications."[190] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[191] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[192] Thus, under this category and associated small business size standard, the great majority of firms can be

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the agency and publishes such definition(s) in the Federal Register."

[188] 15 U.S.C. § 632.

[189] 13 C.F.R. § 121.201, NAICS code 517211.

[190] 13 C.F.R. § 121.201, NAICS code 517212.

[191] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[192] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[193] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[194] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

7. In this present document, we conclude that CMRS carriers should no longer be exempt from 47 C.F.R. § 64.2401(b) – requiring that billing descriptions be brief, clear, non-misleading and in plain language. To the extent that any CMRS carrier is not currently in compliance with this requirement, certain modifications to the carriers' billing practices would be required. Such modifications would include reviewing existing bills and making changes as necessary to ensure that any billing descriptions are clear, non-misleading, and in plain language as required by section 64.2401(b) of our rules.

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[193] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[194] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

8. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

9. We have considered several alternatives to our decision to remove the exemption for CMRS carriers from 47 C.F.R. § 64.2400(b) including retaining that exemption or forbearing from that requirement under section 10 of the Act. Section 64.2401(b) requires that billing descriptions be brief, clear, non-misleading and in plain language. Although the Commission decided in 1999 to exempt CMRS carriers from the requirements of section 64.2401(b), the Commission nevertheless stated that the underlying principle (*i.e.* bills must be clear and non-misleading) should apply to wireless carriers and sought further comment on whether such requirement should be made mandatory to CMRS in the future. In addition, the Commission concluded that sections 201(b) and 202 would continue to apply to wireless billing practices.

10. The record in this proceeding, including comments of several states and individual consumers and the Commission's own complaint data, leads us to conclude that many wireless consumers are confused by the billing

practices of their CMRS provider. As a result, we have decided to require CMRS providers to comply with our requirement that billing practices be clear, brief, and non-misleading. Many CMRS providers have indicated in this proceeding that they already comply with this requirement. As noted above, the identical underlying truth-in-billing principle and sections 201 and 202 have always applied to CMRS providers. Thus, we believe that the burden on CMRS carriers in complying with this requirement will be negligible.

11. **REPORT TO CONGRESS:** The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[195] In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.[196]

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[195] *See* 5 U.S.C. § 801(a)(1)(A).

[196] *See* 5 U.S.C. § 604(b).

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[197] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Second Further Notice of Proposed Rulemaking (*Second Further Notice*). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice* provided above in section VI(D). The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, this *Second Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and Objectives of, the Proposed Rules

2. The Commission determined that significant consumer concerns with the billing practices of wireless and other interstate providers raised in this proceeding, and outstanding issues from the 1999 *Truth-in-Billing Order and Further Notice*, necessitate that we clarify certain aspects of our existing rules and policies affecting billing for telephone service. Consumer confusion over telephone bills inhibits the ability of consumers to compare carriers' service offerings, thus undermining the proper functioning of

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[197] 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

competitive markets for telecommunications services, in contravention of the pro-competitive framework prescribed by Congress in the 1996 Act. Therefore, we propose and seek comment on additional measures to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications service offerings.

3. In particular, we seek comment on the distinction between government "mandated" and other charges, and tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges. We also seek comment on whether it is unreasonable to combine federal regulatory charges into a single line item, though any commenter who still believes that carriers should be able to combine two or more of these charges into a single charge is welcome to refresh the record on how carriers should identify such line items.

4. Furthermore, we tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale, and that such disclosure must occur before the customer signs any contract for the carrier's services.

5. These proposed rules are designed to discourage misleading billing practices, and thereby aid consumers in understanding their telecommunications bills, providing them with the tools they need to make informed choices in the market for telecommunications service.

B. Legal Basis

18. The legal basis for any action that may be taken pursuant to this *Second Further Notice* is contained in

sections 1-4, 201, 202, 206-208, 258, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 206-208, 258, 303(r), and 332; section 601(c) of the Telecommunications Act of 1996; and sections 1.421, 64.2400, and 64.2401 of the Commission's rules, 47 C.F.R. §§ 1.421, 64.2400, and 64.2401.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

18. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[198] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[199] In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[200] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration

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[198] *See* 5 U.S.C. § 603(b)(3).

[199] 5 U.S.C. § 601(6).

[200] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

(SBA).[201]

19. We have included small incumbent LECs in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wireline telecommunications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[202] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[203] We therefore have included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

20. *Incumbent Local Exchange Carriers*. Neither the Commission nor the SBA has developed a small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[204] According to the FCC's *Telephone Trends*

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[201] 15 U.S.C. § 632.

[202] 13 C.F.R. § 121.201, NAICS code 517110.

[203] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to Chairman William E. Kennard, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 5 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[204] 13 C.F.R. § 121.201, NAICS code 517110.

Report data, 1,310 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services.[205] Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees.[206] Consequently, the Commission estimates that the majority of providers of local exchange service are small entities that may be affected by the rules and policies adopted herein.

21. *Competitive Local Exchange Carriers and Competitive Access Providers.* Neither the Commission nor the SBA has developed specific small business size standards for providers of competitive local exchange services or competitive access providers (CAPs). The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. [207] According to the FCC's *Telephone Trends Report* data, 563 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.[208] Of these 563 companies, an estimated 472 have 1,500 or fewer employees, and 91 have more than 1,500 employees.[209] Consequently, the Commission estimates that the majority of providers of

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[205] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at Table 5.3, p. 5 - 5 (May 2004) (*Telephone Trends Report*). This source uses data that are current as of October 22, 2003.

[206] *Id.*

[207] 13 C.F.R. § 121.201, NAICS code 517110.

[208] *Telephone Trends Report*, Table 5.3. The data are grouped together in the *Telephone Trends Report.*

[209] *Id.*

competitive local exchange service and CAPs are small entities that may be affected by the rules.

22. *Local Resellers.* The SBA has developed a specific size standard for small businesses within the category of Telecommunications Resellers. Under that standard, such a business is small if it has 1,500 or fewer employees.[210] According to the FCC's *Telephone Trends Report* data, 127 companies reported that they were engaged in the provision of local resale services.[211] Of these 127 companies, an estimated 121 have 1,500 or fewer employees, and six have more than 1,500 employees.[212] Consequently, the Commission estimates that the majority of local resellers may be affected by the rules.

23. *Toll Resellers.* The SBA has developed a specific size standard for small businesses within the category of Telecommunications Resellers. Under that SBA definition, such a business is small if it has 1,500 or fewer employees.[213] According to the FCC's *Telephone Trends Report* data, 645 companies reported that they were engaged in the provision of toll resale services.[214] Of these 645 companies, an estimated 619 have 1,500 or fewer employees, and 26 have more than 1,500 employees.[215] Consequently, the Commission estimates that a majority of toll resellers may be affected by the rules.

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[210] 13 C.F.R. § 121.201, NAICS code 517310.

[211] *Telephone Trends Report*, Table 5.3.

[212] *Id.*

[213] 13 C.F.R. § 121.201, NAICS code 517310.

[214] *Telephone Trends Report*, Table 5.3.

[215] *Id.*

24. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. [216] According to the FCC's *Telephone Trends Report* data, 281 carriers reported that their primary telecommunications service activity was the provision of interexchange services.[217] Of these 281 carriers, an estimated 254 have 1,500 or fewer employees, and 27 have more than 1,500 employees.[218] Consequently, we estimate that a majority of interexchange carriers may be affected by the rules.

25. *Operator Service Providers.* Neither the Commission nor the SBA has developed a size standard for small entities specifically applicable to operator service providers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[219] According to the FCC's *Telephone Trends Report* data, 21 companies reported that they were engaged in the provision of operator services.[220] Of these 21 companies, an estimated 20 have 1,500 or fewer employees, and one has more than 1,500 employees.[221] Consequently, the Commission estimates that a majority of operator service

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[216] 13 C.F.R. § 121.201, NAICS code 517110.

[217] *Telephone Trends Report*, Table 5.3.

[218] *Id.*

[219] 13 C.F.R. § 121.201, NAICS code 517110.

[220] *Telephone Trends Report*, Table 5.3.

[221] *Id.*

providers may be affected by the rules.

26. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small entities specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees. [222] According to the FCC's *Telephone Trends Report* data, 65 carriers reported that they were engaged in the provision of "Other Toll Services."[223] Of these 65 carriers, an estimated 62 have 1,500 or fewer employees, and three have more than 1,500 employees.[224] Consequently, the Commission estimates that a majority of "Other Toll Carriers" may be affected by the rules.

27. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[225] and "Cellular and Other Wireless Telecommunications." [226] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total,

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[222] 13 C.F.R. § 121.201, NAICS code 517110.

[223] *Telephone Trends Report*, Table 5.3.

[224] *Id.*

[225] 13 C.F.R. § 121.201, NAICS code 517211.

[226] 13 C.F.R. § 121.201, NAICS code 517212.

that operated for the entire year.[227] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[228] Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[229] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[230] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

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[227] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[228] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[229] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[230] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

17. As noted, we tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges; and that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale. Furthermore, we seek comment on whether it is unreasonable to combine federal regulatory charges into a single line item. However, we also tentatively conclude that the Commission should reverse its prior holding permitting states to enact and enforce telecommunications carrier-specific truth-in-billing rules. This tentative conclusion is designed to address the potential for inconsistent state regulation of CMRS and other interstate carrier billing practices, and thereby simplify the requirements for such carriers' compliance with potentially disparate billing regulations. Aside from simplifying procedural compliance requirements for small entities, we expect that this measure also will alleviate some compliance costs for small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

18. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance

or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[231]

19. As described above, we seek comment on the distinction between government "mandated" and other charges, and tentatively conclude that where carriers choose to list charges in separate line items on their customers' bills, government mandated charges must be placed in a section of the bill separate from all other charges. We also seek comment on whether it is unreasonable to combine federal regulatory charges into a single line item, though any commenter who still believes that carriers should be able to combine two or more of these charges into a single charge is welcome to refresh the record on how carriers should identify such line items. Furthermore, we tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale, and that such disclosure must occur before the customer signs any contract for the carrier's services. For each of these issues and tentative conclusions, we seek comment on the effects our proposals would have on small entities, and whether any rules that we adopt should apply differently to small entities.

20. For instance, the *Second Further Notice* seeks comment on whether the Commission should require standardized labeling of categories of charges on consumers' bills, and what the monetary costs of such a requirement would be. We particularly seek comment on the nature of the economic impact of such a requirement on small entities, and whether the proposed requirement should be applied to them

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[231] 5 U.S.C. § 603(c)(1)-(c)(4).

in any manner different from its application to entities that do not qualify as small entities.[232] In addition, we tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale, and that such disclosure must occur before the customer signs any contract for the carrier's services. We specifically seek comment on the effect of these tentative conclusions on small entities, and on whether it would be appropriate to apply whatever provisions we adopt to small entities in the same manner that we apply them to entities that do not qualify as small.[233]

21. We do not have any evidence before us at this time regarding whether proposals outlined in this *Second Further Notice* would, if adopted, have a significant economic impact on a substantial number of small entities. However, we recognize that mandating changes to the format of consumers' bills, and specific point of sale disclosures, likely would result in additional burdens on small CMRS providers and other interstate carriers. We therefore seek comment on the potential impact of these proposals on small entities, and whether there are any less burdensome alternatives that we should consider.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

22. In seeking comment on our tentative conclusion that government mandated charges should be placed in a section of the bill separate from all other charges, where carriers choose to list charges in separate line items on their customers' bills, we note that: 1) section 64.2400(a) of the

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[232] *See supra* para. 46.

[233] *See supra* para. 56.

Commission's rules provides that our truth-in-billing rules are intended "to aid customers in understanding their telecommunications bills, and to provide them with the tools they need to make informed choices in the market for telecommunications service"; and 2) section 64.2401(b) requires that descriptions of billed charges be brief, clear, non-misleading, and in plain language. We seek comment on our stated belief that separating government mandated charges from all other charges satisfies the policy goals embedded in these rules.[234] Though any rules that we may adopt to implement this tentative conclusion thus may overlap somewhat with 47 C.F.R. §§ 64.2400(a) and 64.2401(b), we believe that these new rules would complement the existing rules, rather than duplicating them or conflicting with them.

23. In tentatively concluding that bases other than the rate regulation proscription of section 332(c)(3)(A) exist for the Commission to preempt state regulation of carriers' billing practices, we tentatively conclude further that we should reverse our prior pronouncement that states may enact and enforce more specific truth-in-billing rules than ours. In large part, this pronouncement has been embodied by the substance of 47 C.F.R. § 64.2400(c). We seek comment on, if we do adopt this further tentative conclusion, whether we should limit the scope of what constitutes "consistent truth-in-billing requirements by the states" under 47 C.F.R. § 64.2400(c), eliminate section 64.2400(c) from our rules altogether, or adopt an enforcement regime where states are permitted to enforce rules developed by the Commission.[235] Thus, our tentative conclusions may conflict with 47 C.F.R. § 64.2400(c), or may overlap with that rule in a manner in

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[234] *See supra* para. 43.

[235] *See supra* para. 51.

which the existing rule may be harmonized with our tentative conclusions.

LIST OF COMMENTERS AND REPLY COMMENTERS

Due to the significant number of comments filed by individual consumers in this proceeding, we have listed below only those comments received from industry, consumer advocacy groups and governmental entities. All individual consumer comments filed in this proceeding are available for inspection on the Commission's Electronic Comment Filing System (ECFS).

American Association of Retired Persons	AARP
AT&T Corporation	AT&T
AT&T Wireless Services, Inc.	AWS
BellSouth Corporation	BellSouth
California Public Utilities Commission	CPUC
Cingular Wireless LLC	Cingular
Coalition for a Competitive Telecommunications Market	CCTM
Consumers Union et al.	Consumers Union
CTIA – The Wireless Association	CTIA
District of Columbia, Office of the People's Counsel	OPCDC
Florida Public Service Commission	Florida PSC
Global Crossing North America, Inc.	Global Crossing
IDT America, Corp.	IDT
Indiana Office of Utility Consumer Counselor	Indiana OUCC
Indiana Utility Regulatory Commission	Indiana URC
Iowa Utilities Board	Iowa UB
Leap Wireless International, Inc.	Leap
Massachusetts Office of the Attorney General	Massachusetts OAG
MCI, Inc.	MCI

Minnesota Department of Commerce	Minnesota DOC
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates	NASUCA
National Consumers League	Consumers League
National Telecommunications Cooperative Association	NTCA
New Jersey Division of the Ratepayer Advocate	NJ
Nextel Communications, Inc. and Nextel Partners, Inc.	Nextel
Public Utilities Commission of Ohio	Ohio PUC
Rural Cellular Association	RCA
Rural Telecommunications Group, Inc.	RTG
Rural Wireline Carriers	RWC
Satellite Receivers, Cash Depot, and David Charles	Satellite Receivers
SBC Communications, Inc.	SBC
Sprint	Sprint
Telecommunications Research and Action Center	TRAC
Teletruth	Teletruth
Tennessee Emergency Communications Board	TECB
Texas, State of (Office of the Attorney General of Texas)	Texas OAG
The Utility Reform Network and Utility Consumers Action Network	TURN & UCAN
T-Mobile USA, Inc.	T-Mobile
TracFone Wireless, Inc.	TracFone
United States Cellular Corporation	USCC
United States Communications Association	USCA
United States Telecommmunications	USTA

Association	
Verizon Communications Inc.	Verizon
Verizon Wireless	Verizon Wireless

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Truth-in-Billing and Billing Format (CC Docket No. 98-170); National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling (CG Docket No. 04-208), Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking.

Wireless consumers deserve accurate, meaningful billing information in a format they can understand. Today's item places the power of choice in the hands of the American consumer by eliminating the current exemption for CMRS carriers from providing customers' with brief, clear and non-misleading billing descriptions, and makes additional clarifications to our existing truth-in-billing rules to facilitate the provision of accurate consumer information.

Today's item also opens the door for public comment on additional measures to facilitate the ability of consumers to make informed choices among competitive telecommunications service offerings. Moreover, our proposal that carriers must disclose the full rate at the point of sale would ensure that consumers are given information at a critical time that they can use it in evaluating their competitive choices, and is especially important where early contract termination fees apply.

Nonetheless, as Congress recognized, wireless service is inherently an interstate service. As a result, it is simply not sustainable to have a multitude of divergent, and at times intrusive, state-by-state billing regulations. Targeted federal regulation that applies to *all* carriers protects consumers and allows those carriers with national rate plans, such as IXCs and CMRS providers, to operate. However, no action that

we take in this *Order* and the *Declaratory Ruling* below limits states' authority to enforce their own generally applicable consumer protection laws, to the extent such laws do not require or prohibit use of line items. Indeed, like our approach to voice over Internet protocol, we envision an active state partnership in enforcing whatever further rules and guidelines are adopted in this proceeding.

STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Truth-in-Billing and Billing Format, CC Docket No. 98-170; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, CG Docket No. 04-208, Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking.

Today's decision reflects the Commission's important and ongoing role in ensuring that consumers are provided with clear and non-misleading information in their telephone bills. I have frequently argued that the robustly competitive nature of the wireless industry obviates the need for many forms of regulation. So I approach the prospect of imposing new truth-in-billing requirements with some skepticism. I support this item, however, because it strikes an appropriate balance by avoiding burdensome regulation, while recognizing the strong governmental interest in ensuring that consumers fully understand their options. Indeed, consumers can only benefit from the varied and innovative services a competitive market offers if they can make informed choices. While this Order increases carriers' regulatory oversight somewhat at the federal level, it will produce a more streamlined regime overall by preempting state regulations that impede the delivery of pro-competitive benefits to consumers.

Consistent with the practices of most CMRS carriers, this order mandates that billing practices, including line items, be truthful and non-misleading. The phenomenal growth in consumer use of wireless phones reflects the success of the market in delivering a valuable product. At the same time, however, over the past few years, we have seen an increase in the number of complaints received with

respect to wireless carriers. By removing any ambiguity regarding CMRS providers' responsibility to provide clear and non-misleading billing information to their customers, we are strengthening the ability of consumers to shop around and compare prices.

With regard to the preemption aspect of today's decision, it is important to remember that the amazing success of the wireless industry is due in large part to the foresight of Congress in establishing a comprehensive and consistent national regulatory framework for wireless providers. Congress mandated a uniform national regulatory policy for CMRS, not a policy balkanized by individual state decisions. Under this structure, not only is the FCC given the exclusive authority to regulate rates and entry of wireless carriers, but it also is vested with the flexibility, through the exercise of its forbearance authority, to promote competitive market conditions. This framework for CMRS has provided significant benefits to consumers by creating effective competition among wireless providers and spurring innovations such as regional and national calling plans. The Commission must continue to ensure that state regulations do not undermine congressional intent by imposing unnecessary regulatory burdens that would dampen the benefits of wireless competition to consumers.

Even given this clear congressional mandate, I do not approach preemption of state regulatory authority lightly. In this case, we appropriately conclude that the state regulations in question amount to impermissible rate regulation. We also narrowly define our preemption to address only those state regulations that either *require or prohibit* the use of line items. The item makes clear that nothing in our action today limits states' ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must contribute.

The NASUCA petition, which brought these issues before us, proposes sweeping and overbroad regulation that not only would frustrate Congress's and the Commission's important federal goals with respect to the wireless industry, but also would threaten to harm consumer welfare. This would be a step backwards and would frustrate carriers' ability to communicate clearly with their customers. If we did not preempt the type of regulations at issue, we could seriously hinder the wireless industry's ability to offer consumers flexible and innovative regional or national rate plans. Government should not impede the relationship between consumers and their providers.

I also want to make clear that nothing in this item diminishes the recognition that state governments play a critical role in protecting consumers, particularly through enforcement of generally applicable provisions that bar fraud and deceptive practices. Indeed, we specifically seek comment on additional truth-in-billing requirements and the proper role of states and the Commission in carrier billing practices. I look forward to creating a full record on these important issues and to working with my state colleagues to ensure American consumers have access to the information they need.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS, APPROVING IN PART, DISSENTING IN PART

Re: Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking (CC Docket No. 98-170, CG Docket No. 04-208)

My starting point here is that competitive communications markets function best when consumers have access to accurate and meaningful information. When end users have the facts—and have access to those facts in an understandable format—they can make informed choices. Too often, we know, that's not the case. Most phone bills make my point. It's baffling how complicated they are. The explosion of new services and the line items and fees accompanying them have made it more difficult than ever for consumers to compare rates and shop around. You need an accountant or a lawyer—preferably both—to root out what you're being charged for and why.

This is what led NASUCA last year to file a Petition for Declaratory Ruling. NASUCA asked the Commission to prohibit carriers from imposing line items unless the charges are mandated by government action. This is perhaps not the cure for all of our billing ills. It could actually have the unintended effect of inhibiting national wireless one-rate plans. Nevertheless, this petition was the ideal vehicle for the Commission to initiate a fresh dialogue on how to make bills more honest, readable and easy to understand.

I don't believe we are taking advantage of this opportunity. We take one step forward by applying basic

truth-in-billing to wireless services. That's good. Then, amazingly, given the language we hear today on how pro-consumer this Order is, the majority proceeds to put the kibosh on state consumer protection efforts. Now I support the decision to require that wireless carrier billing descriptions be brief, clear and non-misleading. But I must dissent to the majority's decision to preempt state efforts to curb line item abuses or to require that such charges be explained.

The majority says preemption is compelled by the law. This is an incredibly cramped interpretation that ignores the plain meaning of the statute. Congress specifically prohibited states from regulating wireless "rates" but reserved for states the ability to regulate "other terms and conditions." State efforts to curtail or require line item explanations are ***not*** exercises in ratemaking. The legislative history bears me out. It describes the "other terms and conditions" reserved for the states as "such matters as customer billing information and practices." The majority blows breezily by the will of Congress in pursuit of its fixation—or at least its present curious flirtation—with federal preemption.

The majority says that preemption does not preclude state laws of general applicability. Commenters here tell us that state laws as diverse as the Texas Deceptive Trade Practices Act and the Vermont Universal Service Fund Collection Statute may be preempted. Tennessee may find that its billing mechanism to support enhanced 911 services is suddenly suspect. The record suggests that the fate of Washington State's 911 funding system may be similarly uncertain. Indiana's effort to curb line item abuses through that state's Utility Receipts Act may be cut short, and Maine's initiative to make wireless service pricing more transparent is now in question. Many other states may lose authority over consumer billing complaints. It will take

some time for states to survey the debris from this erosion of cooperative federalism. And there may be further wreckage on the horizon, because in the Notice of Proposed Rulemaking accompanying today's Order, the majority tentatively concludes that it should preempt ***all*** state laws involving billing clarity that are more extensive than our minimal federal requirements. As I understand it, this could even apply to wireline as well as to wireless bills.

The majority says that with the states preempted, the Commission will not hesitate to enforce its truth-in-billing requirements. But to date all the Commission has done is hesitate. In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today—the only ones I find involve slamming. Yet in the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.

So we are very likely doing more harm than good here. Lots of people agree with me. Nearly 14,000 consumers have written the Commission urging us not to take this kind of action. Their concerns are echoed in the comments of the AARP, Consumers Union, the National Consumer Law Center, the Massachusetts Union of Public Housing Tenants, the National Consumers League, the Governor of Maine, the Maine Department of Attorney General, the Massachusetts Office of the Attorney General, the Utility Reform Network, the Utility Consumers Action Network, the Vermont Public Service Board, the Minnesota Department of Commerce, the Office of the People's Counsel for the District of Columbia, the Indiana Utility Regulatory Commission, the Office of the Attorney General of Texas, the Tennessee Emergency Communications Board, the Iowa Utilities Board, the New Jersey Division of the Ratepayer Advocate, the National Association of State Utility Commissioners and others. Yet

we forge ahead, bypassing the opportunity NASUCA gave us to rein in incomprehensible bills. I'm afraid consumers will remember that when they called this Commission for help understanding their phone bills, we hung up.

STATEMENT OF

COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

Re: Truth-In-Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing, Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, CG Docket No. 04-208.

In March of last year, a national coalition of consumer advocates, the National Association of State Utility Consumer Advocates (NASUCA), petitioned the Commission, asking the Commission to strengthen its "Truth-in-Billing" rules, which apply to the "line item" charges that are listed separately on consumer telephone bills. NASUCA asked the Commission to address the proliferation of line item charges and to ensure that consumers get accurate information about the total cost of the telecommunications services. In this Order, the Commission largely rejects NASUCA's petition, missing a golden opportunity to provide clarity for consumers. I dissent in part from this item because I am concerned that the Commission turns the consumer advocates' petition on its head and strips away existing consumer protections without putting in place adequate alternative measures.

While the Commission has previously acknowledged the benefits of certain clear and non-misleading line items on consumer bills, many consumer advocates suggest, and the Commission's data seems to confirm, growing levels of consumer complaints about billing for the telecommunications services. Consumer groups, like AARP, have argued that a proliferation of line item charges makes it difficult for consumers to determine the actual price for their

telecommunications service and that this price confusion is a costly issue for consumers. These concerns are at the heart of NASUCA's petition.

Unfortunately, from the consumer's perspective, the most tangible result of this Order will likely be less oversight of consumers' bills, not more. By preempting States, our historic partners in consumer protection, this Order curtails States' ability to moderate line items on consumers' wireless phone bills. The merits and timing of this preemption are questionable, and I cannot support this portion of the Order. The result for consumers, who routinely turn to state public utility commissions for help with billing issues, is very likely less oversight and more confusion, which is hardly the result sought by consumer advocates.

By removing the States' role here, the FCC has set itself up as the sole arbiter of line item charges. This result is not compelled by the Act, which removes States' ability to set rates for wireless service, but preserves States' ability to address "other terms and conditions," which include billing issues. State commissions offered evidence in this record that they are confronted regularly with a myriad of new line item surcharges and new names for existing line items. Similarly, the Commission's existing Truth-in-Billing rules preserved States' ability to adopt consistent requirements, until now. Yet, the Commission reverses course here without even putting this proposal out for comment.

The one measured step in this Order for consumers is the decision to explicitly apply the Commission's Truth-in-Billing rules to wireless carriers. I support this effort to clarify that wireless service bills must be clearly organized and must provide full and non-misleading descriptions of charges. But clarifying that these rules apply to wireless bills alone is unlikely to be a panacea for consumers. The FCC's current Truth-in-Billing rules have not been the basis for a

single Notice of Apparent Liability in the six plus years that they have been in effect.

I am sympathetic to carriers' desire to advertise national rate plans and believe that goal is not irreconcilable with the desire to make consumer bills accurate and clear. Carriers have raised legitimate questions about which government-related charges should be separated out through line items and about the practical difficulties they face in fashioning national rate plans. Yet, this Order does not address which line items should be permitted and whether there are any practical limits to the amount of charges that can be added on above the advertised price. The item leaves for a Further Notice most of the hard questions for carriers and consumers: what costs should carriers be able to separate out through line items? When are line items helpful for consumers, and when do they simply add "noise" that distracts consumers from the ultimate cost of service? Since we are leaving these issues unanswered, it strikes me as premature at best to take away resources available to consumers by preempting State laws and regulations that might moderate the proliferation of line item charges.

I am also troubled by the majorities' tentative conclusions in the attached Further Notice to impose far greater preemption of State oversight of consumer protection and carrier billing practices for both wireless and traditional landline telephone service. The consumer advocates' petition calls for additional clarification about our rules, not a reduction in the resources available to consumers. Particularly when it comes to consumer protection, this Commission should be looking for partners in our efforts, not looking for ways to eliminate them. For these reasons, I approve in part and dissent in part.

APPENDIX E

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NO. C06-343Z

JARED PECK, INDIVIDUALLY AND ON BEHALF OF ALL THE MEMBERS OF THE CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS,

V.

CINGULAR WIRELESS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, D/B/A CINGULAR WIRELESS, ET. AL., DEFENDANTS.

ORDER

Oct. 24, 2006, Filed

This matter comes before the Court on Defendant's Motion to Dismiss Based on Federal Preemption, docket no. 23. The Court, having reviewed the briefs in support of and in opposition to these motions, hereby GRANTS Defendant's Motion to Dismiss.

BACKGROUND

Plaintiff Jared Peck is an individual who is a customer of Defendant Cingular Wireless, LLC ("Cingular"), a provider of wireless cellular telephone service. (Compl., docket no. 4, at 1-2.) Mr. Peck filed suit in King County Superior Court on February 14, 2006, alleging that Defendant Cingular

billed, charged, and collected a business and occupation (B&O) tax surcharge in violation of RCW 82.04.500.[1] (Compl. at 2.) Mr. Peck seeks to represent a class of all current or past Washington state cellular phone customers of Cingular from whom it collected a "State B and O Surcharge" as a line item appearing on the customers' bills. (Compl. at 2.) Cingular filed to remove this case to federal court on March 13, 2006. (Notice of Removal, docket no. 1.) Mr. Peck did not oppose removal. Cingular now brings this Motion to Dismiss Based on Federal Preemption, docket no. 23.

DISCUSSION

The Federal Communications Act ("FCA"), 47 U.S.C. § 332, prohibits states from regulating the "rates" of commercial mobile telephone service, but reserves to the states regulation of "other terms and conditions" of such service. The relevant section states:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land

[1] "It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons." RCW 82.04.500

> line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3)(A). Cingular argues that the Court should dismiss Mr. Peck's claims because they are a challenge to Cingular's rates and are preempted by federal law. (Mot. to Dismiss, docket no. 23, at 1.) Mr. Peck argues that his claims do not challenge Cingular's rates and are not preempted. (Pl.'s Resp. to Mot. to Dismiss, docket no. 43, at 1.) For the reasons set forth below, the Court concludes that state regulation of line items constitutes rate regulation and that Mr. Peck's claims are preempted by § 332. (2006).

A. Section 332 Preempts State Regulation of Line items

In 2005, the Federal Communications Commission ("FCC") issued a declaratory ruling[2] that a state regulation curtailing a wireless carrier's ability to structure its bills and isolate charges into separate line items "would have a direct effect on a [wireless] carrier's rate structure presented to its end users and, if instituted by a state commission, would be preempted by [§ 332(c)(3)]." *Second Report and Order in re Truth and Billing*, 20 F.C.C.R. 6448, para. 31, 6464 (2005)

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[2] In the Second Report and Order, the FCC "address[ed] a Petition for Declaratory Ruling filed by [NASUCA] seeking to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customer's bill that was not mandated or authorized by federal, state, or local law." Second Report and Order in re Truth and Billing, 20 F.C.C.R. 6448, para. 1, at 6449 (2005).

("Second Report and Order"). However, the Eleventh Circuit reviewed the *Second Report and Order* and held that "[b]ecause the regulation of line-item billing is not rate regulation, the express language of section 332 (c)(3)(A) of the Communications Act does not preempt state regulations that require or prohibit the use of line items on cellular wireless bills." *Nat'l Ass'n of State Util. Consumer Advocates v. Fed. Commc'n Comm'n,* 457 F.3d 1238, 1258 (2006) *("NASUCA").*[3] Because the interpretation of rates contained in the *Second Report and Order* is consistent with other court rulings and prior FCC usage of the term, this Court affords deference to the FCC interpretation of § 332. *See Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837 (1984).

An agency interpretation is entitled to deference if (1) the plain language of the statute is ambiguous or silent on the precise question at issue, and (2) the agency interpretation is based on a permissible construction of the statute. *Chevron,* 467 U.S. at 842-43. "[W]here a statute's plain terms admit of two or more reasonable usages, the Commission's choice of one of them is entitled to deference." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 125 S.Ct. 2688, 2704 (2005) (citing *Verizon Commc'n Inc. v. FCC,* 535 U.S. 467, 498 (2002). Shortly after *Nat'l Cable,* the Ninth Circuit applied *Chevron* to an FCC interpretation of a different section of the FCA, and found that the FCC's interpretation was entitled to deference. *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.,* 423 F.3d 1056, 1064-70. The Ninth Circuit held that the FCC's interpretation was entitled to deference because "nothing in

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[3] Mandate has not issued in NASUCA. Petition for rehearing en banc was filed on September 14, 2006 and is currently pending. Eleventh Circuit docket no. 05-1 1682-DD.

the statute clearly preclude[d] the construction offered," *id.* at 1068, and the FCC's interpretation was "reasonable," *id.* at 1070.

The FCC's interpretation of "rates" meets the first prong of the *Chevron* test because there are at least two reasonable usages of "rates" as it is used in § 332. The common meaning of "rate" permits the FCC's interpretation of "rate" in § 332. Dictionaries define a "rate" as "an amount of a charge or payment . . . having relation to some other amount or basis of calculation," Oxford English Dictionary (2d ed. 1989), and "an amount paid or charged for a good or service," Black's Law Dictionary (8th ed. 2004). The *NASUCA* court held that "[s]tate regulations of line items regulate the *billing practices* of cellular wireless providers, not the *charges* that are imposed on the consumer. The Eleventh Circuit held that because the presentation of line items on a bill is not a 'charge or payment' for service, it is an 'other term or condition' regulable by the states." *Id.* (emphases added) (citations omitted). However, a line item is one of the charges a wireless customer pays in order to receive service. An ambiguity exists because "rate" could mean only the carrier's base rate, or it could refer to the total amount a customer pays for service.

The FCC's interpretation of "rates" meets the second prong of the *Chevron* test because it is a permissible usage of the term. The FCC concluded that "state regulations requiring or prohibiting the use of line items . . . constitute rate regulation and are preempted under section 332(c)(3)(A)." *Id.* Specifically, the FCC concluded that "rates charged" in § 332(c)(3)(A) includes regulation of line items. 20 F.C.C.R. para. 30, at 6462–63. The FCC found that, although Congress did not define the term "rates charged" in the FCA, rate regulation under § 332(c)(3)(A) includes regulation of "rate levels" and "rate structures," and that state regulations regarding whether or not certain costs

may be recovered by a separate line item "clearly and directly affect" rate structure. *Id.* para. 30–31, at 6463. To illustrate the fact that regulation of line items affects rates, the FCC explained that if states were permitted to regulate whether or not certain costs could be recovered by a line item, a carrier would have to tailor its rates and rate structure state-by-state. *Id.* para. 31, at 6464. Because this is a plausible interpretation of "rates," this court gives deference to the FCC interpretation. The Eighth Circuit has agreed with the FCC'as interpretation of "rate regulation" under § 332(c)(3)(A) and has held that state action which "has a clear and direct effect on rates" constitutes rate regulation. *Cellco Partnership v. Hatch,* 431 F.3d 1077, 1083 (2005).

The *Second Report and Order* is consistent with previous FCC decisions. However, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Nat'l Cable,* 125 S.Ct. at 2699. Furthermore, an agency is allowed to change an interpretation and explain its reasons for the change. *Id.* at 2699-2700. The FCC in its *Second Report and Order* gives adequate reasoning for its interpretation of "rates." The FCC noted that, while it had previously recognized that "state regulation of customer billing practices fall within 'other terms and conditions,'" the FCC had never before addressed the more specific question of "where among section 332(c)(3)(A)'s key terms state regulation prohibiting or requiring line items should fall." 20 F.C.C.R. at 6464 n.90.

For the reasons stated above, the Court gives deference to the FCC's interpretation of § 332 and holds that state regulation of line items is preempted by federal law.

B. Plaintiff's Claims are Preempted by § 332

Mr. Peck's claims are based on state law. However, "it is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under

Section 332." *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, para. 28, at 17037 (2000). Mr. Peck claims that Cingular's "collection" of the state B&O tax as a line item violates Washington law. (Compl. at 3.) Nevertheless, because the collection of the tax directly affects the rate Cingular charges, Mr. Peck's claims are preempted by § 332(c)(3)(A).

Mr. Peck argues that his claims are not preempted because another court in this district has previously ruled that claims under the Washington Consumer Protection Act ("CPA") were not preempted by the FCA. *See* Order on Plaintiff's Motion for Remand, *Baxter Air v. NOS Commc'ns, Inc.*, Civ. No. C05-21 19P (March 10, 2006). The plaintiff in *Baxter Air* alleged that the defendant used "a complex and difficult-to-understand 'call-unit' billing method," thereby engaging in an "unfair or deceptive business practice" in violation of the CPA. *Id.* at 1. By contrast, Mr. Peck alleges that Cingular's "billing and collecting" of the state B&O tax as a line item on his bill violates the CPA. (Compl. at 7.) Mr. Peck does not allege an unfair or deceptive business practice in his Complaint.[4]

Similarly, Mr. Peck cites *Metrophones* for his contention that his claims are not preempted. Pl.'s Resp. at 8. While it is true that some of the claims in *Metrophones*, including a state law breach of contract claim, were not preempted, the Ninth Circuit did not hold that all breach of contract claims are not preempted. Rather, *Metrophones* held that the

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[4] While Mr. Peck states in his Response to Defendant's Motion to Dismiss that he "claims that Cingular engages in an unfair and deceptive practice by not adequately disclosing to consumers that it passes on its Washington State B&O tax obligations in the form of a line item," Pl.'s Resp. at 4, nothing in the Complaint alleges that Cingular failed to disclose rates or taxes it charges to consumers.

plaintiff's breach of contract claim was not preempted because it was not inconsistent with the FCA. *Metrophones,* 423 F.3d at 1076. Mr. Peck's breach of contract claim is inconsistent with § 332 because it is based on the allegation that Cingular billed, charged, and collected the B&O tax as a line item, an allegation that implicates Cingular's rates.

CONCLUSION

Defendant's Motion to Dismiss, docket no. 23, is GRANTED because Plaintiff Peck's claims are preempted by 47 U.S.C. § 332(c)(3)(A).

IT IS SO ORDERED.

DATED this 24th day of October, 2006.

/s/
Thomas S. Zilly
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. C06-343Z

JARED PECK, INDIVIDUALLY AND ON BEHALF OF ALL THE MEMBERS OF THE CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

CINGULAR WIRELESS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, D/B/A CINGULAR WIRELESS, ET. AL., DEFENDANTS.

MINUTE ORDER

Nov. 11, 2006, Filed

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

1. Pursuant to Local Rule CR 7(h)(1), motions for reconsideration are disfavored and will ordinarily be denied unless there is a showing of (a) manifest error in the prior ruling, or (b) facts or legal authority which could not have been brought to the attention of the court earlier, through reasonable diligence. Plaintiff argues that the Court's prior Order, docket no. 61 (October 24, 2006), should be reconsidered due to manifest error. The fact that mandate had

not issued in *Nat'l Ass'n of State Util. Consumer Advocates v. Fed. Commc'n Comm'n*, 457 F.3d 1238 (11th Cir. 2006), *modified on reh'g*, __F.3d__, 2006 WL 3095390 (11th Cir. 2006), was immaterial to the Court's prior ruling. Notwithstanding the Eleventh Circuit's vacatur of the *Second Report and Order in re Truth in Billing*, 20 F.C.C.R. 6448 (2005), the Court finds that Plaintiff's claims are preempted by 47 U.S.C. § 332(c)(3)(A). *See Railway Labor Executives' Ass'n v. I.C.C.*, 784 F.2d 959, 964 (9th Cir. 1986); *U.S. v. Clark*, 617 F.2d 180, 184 n.4 (9th Cir. 1980). Plaintiff Jared Peck has failed to show manifest error in the Court's prior ruling, and has failed to show new facts or legal authority that were not addressed in the prior motion to dismiss. Accordingly, Plaintiff's motion for reconsideration, docket no. 67, is DENIED.

2. The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 30th day of November, 2006.

BRUCE RIFKIN, Clerk

/s/
Claudia Hawney

By Claudia Hawney
Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NO. C06-0592-JCC

CHRISTOPHER W. HESSE, AND NATHANIEL OLSON, PLAINTIFFS,

v.

SPRINT SPECTRUM L.P. D/B/A SPRINT PCS, AND SPRINT NEXTEL CORPORATION, DEFENDANT

ORDER

Jan. 18, 2007, Filed

This matter comes before the Court on Defendant's motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and Plaintiff Olson's Motion to Dismiss Defendants' Insufficient Defense as a Basis for Federal Jurisdiction.[1] Having carefully considered the parties' relevant

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[1] Defendant submitted substantially the same motion to dismiss in both *Hesse* (Dkt. No 12 in C06-0592-JCC) and *Olson* (Dkt. No. 18 in C06-1127-JCC) prior to this Court's consolidation of those two matters. Plaintiff Olson also submitted a motion to dismiss Defendant's defense of preemption (Dkt. No. 10 in C06-1127-JCC) that also asked the Court to resolve the preemption issue. The Court will address all of these motions simultaneously.

oppositions, replies and other submissions and determined that oral argument is not necessary, the Court hereby rules as follows.

I. BACKGROUND

The Washington Code prohibits businesses from levying a Business and Occupation tax (hereinafter "B & O tax") on consumers. Wash. Rev. Code § 84.04.500. Rather, such taxes may only "constitute a part of the operating overhead" of such businesses. *Id.* Plaintiffs assert that Defendant Sprint Spectrum L.P. (hereinafter "Sprint") violated this section by assessing its customers a B & O tax as a separate line-item on their bills. Sprint moved to dismiss Plaintiffs' complaints on the ground that their state law claims are preempted by federal law under 47 U.S.C. § 332(c)(3)(A), and Plaintiff Olson separately moved to have this defense dismissed.

II. ANALYSIS.

A. Sprint's Motion to Dismiss

Washington's prohibition on levying the B & O tax is, in effect, a line-item regulation. While § 84.04.500 prevents the "levying" of the B & O tax on purchasers or customers, it does not prevent businesses from recouping the costs of the tax from their customers in the form of higher overall fees for services. Wash. Rev. Code § 84.04.500; *Nelson v. Appleway Chevrolet, Inc.*, 121 P.3d 95, 103 (Wash. Ct. App. 2005) ("[T]he economic burden of a tax is usually passed on the customers, but that does not mean that legislatures cannot design statutes to set forth the manner in which the pass-through must take place. Here, RCW 82.04.500 provides that the B & O tax can be added to operating overhead but cannot be passed

on to the customer as a tax.") Since the regulation allows businesses to raise a customer's overall fees but does not allow the businesses to list a specific fee assessment for the tax on a customer's bill, the tax is functionally a line-item regulation.

The issue in this case is whether federal law preempts such line-item regulations. The answer to that question depends on the meaning of the word "rate" and "other terms of service" in the Federal Communications Act (FCA). The Act preempts states from regulating "the rates charged by any commercial mobile service or any private mobile service," while allowing states to regulate "the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A). Unfortunately, this Section "never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless services" and thus "leaves its key terms undefined." *Cellular Telecomm. Indus. Ass'n v. F.C.C.*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). Sprint contends that Washington's prohibition on the assessment of its B & O tax constitutes "rate" regulation and is thus preempted under Federal Law. Plaintiffs argue that it constitutes "other terms" of service that is within the purview of state regulation.

The FCC itself has already weighed in on this question. It found that "state regulations requiring or prohibiting the use of line items—defined here to mean a discrete charge identified separately on an end user's bill—constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act." *Second Report and Order in re Truth and Billing*, 20 F.C.C.R. 6448, 6462 (2005).

This Court must generally give deference to the FCC's interpretation of an ambiguous statute within its jurisdiction. *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1067 (9th Cir. 2005) (quoting *Chevron*,

U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984)). Such *Chevron* deference is due if (1) the plain language of the statute is ambiguous or silent on the issue at hand and (2) the agency's interpretation is based on a permissible interpretation of the statute. *Chevron*, 467 U.S. at 842-43.

As Judge Zilly of this District has previously explained, with regard to the first prong of the *Chevron* analysis, it is not clear from the plain language of § 332 whether regulation of "rates" encompasses regulation of specific line items. *Peck v. Cingular Wireless, LLC*, No. C06-0343-TSZ, slip op. at 4 (W.D. Wash. Oct. 24, 2006). The ordinary meaning of the word rate is "an amount paid or charged for a good or service." *Black's Law Dictionary* (8th ed. 2004). Thus, in the context of a cellular phone service contract the word "rate" could refer either to the base rate of the carrier or to the overall amount a customer pays for service. *Peck*, No. C06-0343-TSZ at 4. Here, for example, the state prohibits businesses from charging its customers for a B & O tax, and thus in some sense prohibits the specific charges or "rates" that these businesses can assess. At the same time, the statute allows the economic burden of the tax to be passed onto customers in the form of higher overall service fees to recoup overhead, and thus in another sense the prohibition does not alter the overall charges or "rates" businesses may require of their customers. Thus, regardless of which interpretation of the word "rates" is preferable, there certainly is ambiguity in the statute's usage of the term.[2]

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[2] This Court recognizes that the Eleventh Circuit came to a different conclusion, and respectfully disagrees with its opinion. *See Nat 'l Ass 'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1254 (11th Cir. 2006) ("The language of section 332(c)(3)(A) *unambiguously* preserved the ability of the States to regulate the use of line items in cellular wireless bills" (emphasis added) (modified on reh'g, 468 F.3d 1272 (11th Cir.

Turning to the second prong of the *Chevron* analysis, the FCC's interpretation of "rates" is reasonable. First, it deals with one of the two plausible interpretations of rates outlined above. *See Second Report and Order in re Truth and Billing,* 20 F.C.C.R. at 6463. ("State regulations that prohibit a CMRS [Commercial Mobile Radio Service] carrier from recovering certain costs through a separate line item, thereby permitting cost recovery only through an undifferentiated charge for service, clearly and directly affect the manner in which the CMRS carrier structures its rates.")]. Second, the FCC's interpretation of "rates" is consistent with the goals of regulation on a national level because "[a] CMRS carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction." *Id.* at 6464.

Accordingly, under the two-part *Chevron* framework, the FCC's interpretation of the term "rates" in § 332 is entitled to deference.

Plaintiffs dispute the application of the FCC's interpretation of *Second Report and Order in re Truth and Billing* to the instant case, arguing that Washington's B & O tax is a tax of general applicability rather than an attempt to regulate cellular telephone rates. (Pl.'s Opp'n 11 (Dkt. No. 19 in C06-0592-JCC)). Plaintiffs base their argument on the language of the relevant FCC ruling, which states that "no action we propose will limit states' ability to enforce their own generally applicable consumer protection laws." *(Id.* at 12 (quoting *Second Report and Order in re Truth and Billing,* 20 F.C.C.R. at 6450).) It is true that § 82.04.500 does apply generally to businesses in

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2006))).

Washington and does not single out cellular phone companies. However, Plaintiffs misread the FCC's opinion regarding the FCA's preemptive effect as to such generally applicable laws. The FCC wrote: "we emphasize that no action that we take in this Second Report and Order and the Declaratory Ruling below limits states' authority to enforce their own generally applicable consumer protection laws, *to the extent such laws do not require or prohibit use of line items,* nor limits a state's ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must contribute." *Id.* at 6458 (emphasis added). Here, the generally applicable law prohibits the use of specific line items and to the extent that it does so it is preempted.

Plaintiffs argue that the two different complaints from the consolidated *Hesse* and *Olson* cases are different. They contend that the *Hesse* claims only allege a violation of Washington law whereas the claims in *Olson* also include breach of contract claims. (*See* Pl.'s Supplemental Brief Discussing the Effect of Consolidation on Pending Motions 4-7 (Dkt. No. 40 in C06-0592-JCC).) To the extent that the contract claims are predicated on a violation of § 82.04.500 they are preempted.[3] Thus, for example, Plaintiffs' claim outlined in ¶ 4.2 of the *Olson* Complaint is preempted because it states that Sprint is in breach for "improperly charging and collecting a 'Washington State B & O Tax Surcharge' [] in violation of RCW 82.04.500" (*See*

[3] This allegation would also not state a valid violation of Washington law because the Consumer Protection Act, by its own terms, does not apply where its application would be preempted by federal law. *See* Wash. Rev. Code § 19.86.170.

Olson Compl. 7 (Dkt. No. C06-1127-JCC)) because there could be no breach of contract under this theory without there first being a violation of § 82.04.500.

However, ¶ 4.1 of that Complaint states a subtly different breach of contract theory. It alleges that "Defendant breached the contract for service with Plaintiff and the class members by billing and charging a 'Washington State B & O Tax Surcharge' apart from and in addition to the agreed calling plan rate." This claim alleges that Sprint agreed to provide service at a specified rate and then provided service at a higher rate over and above that which Plaintiffs contracted to pay. That the amount is labeled a "Washington State B & O Tax Surcharge" is immaterial to the claim. The argument is similar to a case in which parties to a sales contract agree on an overall price that includes sales tax and, in violation of this agreement, the seller nevertheless bills the buyer an additional amount above the agreed-upon rate under the guise of collecting a "sales tax." Such "breach of contract or false advertising claims [are] appropriately reviewable by a state court." *In re Wireless Consumers Alliance, Inc.* 15 F.C.C.R. 17021, 17035 (2000).

Thus, the majority of Plaintiffs' claims are preempted under the FCA. Only those breach of contract claims that do not rely on an alleged violation of § 82.04.500 remain.

B. Plaintiffs' Motion for Leave to Amend their Complaint

Plaintiffs finally ask the Court for leave to amend their complaint to state a claim under federal law should the Court rule against them on the preemption issue. (Pl.'s Opp'n 15-18 (Dkt. No 19 in C06-0592-JCC)). Federal Rule of Civil Procedure 15's directive that such

motions to amend "shall be freely given when justice so requires" is "to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Accordingly, Plaintiff's motion for leave to amend is hereby GRANTED.

C. Sprint's Motion to Strike

Sprint moved to strike portions of Plaintiffs' supplemental brief because Sprint disputes Plaintiffs' contention that it is "undisputed" that Sprint did not disclose the B & O tax to consumers. (Dkt. No. 42.) The Court has noted Sprint's objection but declines to strike any portion of Plaintiffs' brief at this time.

III. CONCLUSION

Sprint's Motion to Dismiss is hereby GRANTED IN PART and Plaintiff's Motion to Dismiss Defendant's Insufficient Defense as a Basis for Federal Jurisdiction is DENIED IN PART: all of Plaintiffs' claims except those arising from breach of contract not predicated on a violation of § 84.04.500 are hereby DISMISSED.

Plaintiffs' Motion for Leave to Amend their Complaint is hereby GRANTED. Sprint's Motion to Strike Portions of Plaintiffs' Supplemental Brief is DENIED.

SO ORDERED this 18th day of January, 2007.

/s/
John C. Coughenour
United States District Judge

APPENDIX H

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION
302 W. WASHINGTON STREET, SUITE E-306
INDIANAPOLIS, INDIANA 46204-2764

August 1, 2003

Dear Telecommunications Carrier:

It has come to the attention of the IURC that many telecommunications carriers have decided to pass through to their customers, via a separate line item on their bills, the Indiana Utility Receipts Tax. This tax on utility companies was created and passed into law as a part of House Bill 1001 in the 2002 Indiana General Assembly and became effective January 1, 2003.

Indiana Code Section 6-2.3-2-1 states that the Utility Receipts Tax is an "income tax". other income taxes are treated by utilities as "costs of doing business" and are included in base rates rather than as a separate line item on customers' bills. An example of that treatment is the former Indiana Gross Receipts Tax of 1.2%, which prior to January 1, 2003 was included as a cost of doing business in the base rates of Indiana utilities and was not listed as a separate line item on customer bills. The Indiana Gross Receipts Tax was eliminated on the same date that the Indiana Utility Receipts Tax of 1.4% became effective.

By including this tax as a separate line item of the bill, customers may mistakenly believe that the State has assessed a tax on the customer, rather than on the utility. The utilities that are including this as a line item on customer bills do not

appear to have reduced their basic service rate for the elimination of the Indiana Gross Receipts Tax, nor are they charging only the increase over the previous gross receipts tax to their customers. This may result in the utilities over- or double-recovering taxes because the tax is already included in base rates, and is also being assessed as a separate line item on customer bills. We are also concerned that revenues collected through this Utility Receipts Tax line item may not be included in the utility's reported gross revenues, effectively exempting those revenues from taxation and inclusion in the calculation of the Public Utility Fee.

If companies persist in placing taxes that the Legislature levied on the utility on customer's bills as a separate line item, the Commission expects that companies will impose such line items in a consistent manner that is compliant with Indiana law and Commission regulation. For example, the Commission would expect to see similar line items crediting customers for decreases in the utility's expenses arising from the elimination of taxes which were also part of House Bill 1001 in the 2002 General Assembly as well as any other tax or fee decreases that occur going forward.

Therefore, the Commission is instructing telephone utilities to discontinue the practice of including a separate line item on bills that passes through the Indiana Utility Receipts Tax to customers. Telephone utilities that continue this practice will be subject to further investigation by the Commission.

Sincerely,

/s/
William McCarty, Chairman
Indiana Utility Regulatory
Commission

APPENDIX I

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SPECIAL PROVISIONS RELATING TO RADIO
GENERAL PROVISIONS

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§ 332. Mobile services

(a) Factors which Commission must consider. In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 1 of this Act, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees.

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by

advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of *title 5, United States Code*, or section 3679(b) of the Revised Statutes (*31 U.S.C. 665(b)*).

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services.

(1) Common carrier treatment of commercial mobile services.

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act [*47 USCS § 201*]. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission

finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after the date of enactment of this subparagraph [enacted Aug. 10, 1993], complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services. A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993 [enacted Aug. 10, 1993]) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption.

(A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of

the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993 [enacted Aug. 10, 1993], petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation

shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation. Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 of the corporation authorized by title III of such Act.

(5) Space segment capacity. Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership. The Commission, upon a petition for waiver filed within 6 months after the date of enactment of the Omnibus Budget Reconciliation Act of 1993 [Aug. 10, 1993], may waive the application of section 310(b) to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b).

(7) Preservation of local zoning authority.

(A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly

filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities compiy with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions. For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses,

but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

(8) Mobile services access. A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions. For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in section 3) that is not a commercial

mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

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No. 06-1184

Supreme Court, U.S.
FILED
MAY 7 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINT NEXTEL CORPORATION &
T-MOBILE USA, INC.,

Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), generally prohibits States from regulating the "rates charged by" wireless carriers but expressly preserves States' authority to regulate "other terms and conditions" of wireless service. The Federal Communications Commission declared that any State law requiring or prohibiting wireless carriers' use of line items on customer bills is expressly preempted by Section 332(c)(3)(A). The Eleventh Circuit vacated the FCC's ruling, concluding that Congress unambiguously preserved States' authority to regulate the use of line item charges in wireless bills. The questions presented for review are:

1. Whether the Eleventh Circuit correctly held, under Step One of the analysis set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), that the FCC erred in ruling that state and local laws prohibiting line item charges on wireless bills were preempted under Section 332(c)(3)(A).

2. Whether the Eleventh Circuit erred by applying the presumption against preemption to guide its analysis of Section 332(c)(3)(A) under *Chevron* Step One.

RULE 29.6 STATEMENT

The National Association of State Utility Consumer Advocates and the National Association of Regulatory Utility Commissioners are incorporated associations, neither of which is publicly traded, whose members include State governmental agencies concerned with the regulation of public utilities.

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H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378 ..... 4, 5, 6

OTHER MATERIALS

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INTRODUCTION

Petitioners present no grounds warranting review by the Court of the Eleventh Circuit's decision vacating the Federal Communications Commission's ("FCC") Declaratory Ruling that Section 332(c)(3)(A) of the Communications Act of 1934 ("Act")[1] prohibits state regulation of wireless carriers' line item charges. Indeed, the petition must be sifted carefully to find a statement of the grounds supporting review in this case. Contrary to Petitioners' assertions, the Eleventh Circuit's decision does not present any real or direct conflict with other decisions of the Circuit Courts of Appeals or this Court with respect to either its analysis under *Chevron* Step One or its reference to the presumption against preemption as guidance in performing that analysis.

Rather than demonstrating a real and intolerable conflict among the Circuits, or a conflict with this Court's prior rulings, the petition for review is based on Petitioners' claim that the Eleventh Circuit erred in vacating the FCC's Declaratory Ruling. This is not a sufficient basis for review. Recognizing this defect in their argument, Petitioners seek to elevate the importance of the Eleventh Circuit's decision by mischaracterizing its impact, both on wireless consumers and on the statutory scheme for regulating wireless telecommunications. The Eleventh Circuit's ruling, however, does not present any issues of pressing national importance. *First*, Petitioners overstate the effect of the Eleventh Circuit's ruling on wireless carriers and consumers while ignoring legitimate State interests served by the laws in question. *Second*, Petitioners exaggerate the impact of the court's ruling on the federal-state wireless regulatory scheme by mischaracterizing Congress' 1993 amendments to the Act and by wrongly suggesting that preemption may be implied to achieve those purposes.

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[1] 47 U.S.C. §§ 151 *et seq.*

Finally, the Eleventh Circuit's decision was correct on the merits. The court properly based its decision on the two-step analysis established by the Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron* Step One, the 11th Circuit independently reviewed Section 332(c)(3)(A) of the Act to determine whether Congress unambiguously spoke to the precise question addressed by the FCC, *i.e.*, whether Section 332(c)(3)(A) preempted or preserved the State laws in question. Likewise, the Eleventh Circuit employed traditional tools of statutory construction in determining that wireless line item charges are not "rates charged by" wireless carriers but rather are billing practices that fall within the scope of "other terms and conditions" of wireless service that States continue to regulate under Section 332(c)(3)(A).

STATEMENT OF THE CASE

A. LEGAL AND REGULATORY BACKGROUND.

1. Regulatory Treatment of Wireless Communications Service.

Communications services have historically been subject to regulation by both States and the Federal government. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 477-78 (2002); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (discussing history of telecommunications regulation in the United States). As this Court has noted, "[i]n broad terms, the [Act] grants to the FCC the authority to regulate 'interstate and foreign commerce in wire and radio communication,' 47 U.S.C. § 151, while expressly denying that agency 'jurisdiction with respect to . . . intrastate communication service . . . .' 47 U.S.C. § 152(b)." *Louisiana PSC*, 476 U.S. at 360; *see* Resp. App. 3-5a. Although Congress amended the Act during the 1990's in order to encourage competition, "[n]either Congress nor the [FCC], however, totally abandoned traditional regulatory requirements [and] . . . the amendments left many

traditional requirements and related statutory provisions . . . in place." *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, No. 05-705, slip op. at 4 (April 17, 2007). Wireless communications are subject to this dual federal-state regulatory regime, although this regime too was revised by Congress in 1993.

Prior to 1993, land mobile radio services (as wireless was then called) were subject to two inconsistent regulatory schemes based on whether the services were characterized as "public" or "private." "Public mobile services" were subject to regulation as common carriers and were thus subject to all federal and state regulations applicable to such entities. The FCC regulated the interstate aspects of such services and States regulated their intrastate aspects, including certification, rates and other terms and conditions of service.[2] "Private land mobile services," *i.e.*, radio services that did not connect with the public telephone network except by direct agreement with a local carrier, however, were exempt from common carrier regulation altogether. *See, generally,* P. Huber, M. Kellogg, & J. Thorne, *Federal Telecommunications Law*, § 10.2, p. 867 (2d ed. 1999).

In 1993, Congress altered this regulatory framework by amending the Act in several respects, including amending Section 332(c)(3)(A). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, § 6002(b)(2)(A) (1993). As amended, section 332(c)(3)(A) provides in pertinent part:

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[2] *See, e.g., Alabama Cellular Serv. v. Sizemore,* 565 So.2d 199 (Ala. 1990); *Re Cellular Alaska P'ship*, 111 P.U.R.4th 303 (Alas. P.U.C. 1989); *Cellular Plus v. Superior Court,* 18 Cal. Rptr.2d 308 (Cal. Ct. App. 1993); *Wolf v. Dept. of Pub. Util.*, 553 N.E.2d 922 (Mass. 1990); *Cellular Tel. Co. v. Rosenberg*, 581 N.Y.S.2d 554 (N.Y. Sup. Ct. 1992); *State ex rel. Util. Comm'n v. Centel Cellular Co.*, 407 S.E.2d 257 (N.C. Ct. App. 1991); *Williams v. Public Serv. Comm'n*, 720 P.2d 773 (Utah 1986); *Bell Atlantic Mobile Systems of West Virginia, Inc.*, Case No. 91-864-C-CN, Commission Order Granting Certificate (W. Va. P.S.C. 1992).

> Notwithstanding sections 2(b) and 221(b) [47 USCS § 152(b) and § 221(b)], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. . . . Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that –
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> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
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> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

47 U.S.C. § 332(c)(3)(A).[3]

Congress stated that the amendments were intended "to provide that services that provide equivalent mobile services are regulated in the same manner...." H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 586. Congress made it clear that the primary purpose of the 1993 amendments was to eliminate

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[3] As originally enacted, Section 332(c)(3) provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." *See* Pub. L. No. 97-259, 96 Stat. 1087, 1096, § 120(a) (1982).

the disparate regulatory treatment of "private mobile" and "public mobile" wireless services, in order both to promote the deployment of wireless service nationwide while at the same time protecting wireless consumers:

> The Committee finds that *the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private. ... To foster the growth and development of mobile services* that, by their nature, operate without regard to state lines *as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.* States may petition the FCC for authority to re-regulate the rates for commercial mobile services under specified circumstances.

1993 U.S.C.C.A.N at 587 (emphasis added).

Congress' goal was not, as Petitioners suggest, to create a uniform, national deregulatory framework for commercial wireless carriers (Pet. 10), or to "eliminate the traditional limitation on federal authority over intrastate . . . wireless service" (*id.* at 18) or to promote nationwide or regional pricing schemes (*id.* at 5). Under the revised regulatory framework, State regulation of commercial mobile radio service ("CMRS," as wireless service is also known) – that is, State regulation of "other "terms and conditions of" wireless service and, under some circumstances wireless "rates," was expressly recognized and preserved. Moreover, Congress made it clear that States' authority over "other terms and conditions" of such service was to be broadly construed:

> *It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis *or such other matters as fall within a states lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

1993 U.S.C.C.A.N. at 588 (emphasis added).

2. Complaints Regarding Carrier Line Items And Other Billing Practices Prompted Regulation.

Carrier billing practices – and in particular carrier line item charges – have been the subject of numerous consumer complaints and the focus of regulation by both the FCC and States in response. For its part, the FCC adopted "Truth-in-Billing" principles and rules governing carrier billing practices in 1999 to address, among other things, the "dramatic growth" in fraudulent "slamming" and "cramming"[4] activities and the "substantial rise" in consumer complaints regarding billed charges. *In re Truth-in-Billing*

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[4] "Slamming" occurs when a company changes a subscriber's carrier selection without that subscriber's knowledge or explicit authorization; "cramming" refers to the practice of causing unauthorized, misleading, or deceptive charges to be placed on consumers' telephone bills. *See In re Truth-in-Billing & Billing Format*, Order on Reconsideration, 15 F.C.C.R. 6023 ¶1 n.2 (2000). Issues concerning carriers' use of line item charges would generally fall under the rubric of "cramming."

and Billing Format, First Report and Order and Notice of Further Proposed Rulemaking, 14 F.C.C.R. 7492, 7494-95 ¶3 (1999). The FCC made it clear that the broad principles it adopted to promote truth-in-billing applied to all telecommunications carriers, wireline and wireless. *Id.* at 7501 ¶13. In addition, while the FCC declined to apply most of its Truth-in-Billing rules to wireless carriers, it "require[d] CMRS carriers to comply with standardized labels for charges resulting from Federal regulatory action," *i.e.*, line items, once such requirements had been adopted. *Id.* at 7502 ¶18. The FCC also issued a further notice of proposed rulemaking, seeking comment whether CMRS carriers should be made subject to the remainder of its rules. *Id.* at 7535 ¶68. Finally, the FCC specifically stated that its Truth-in-Billing principles and rules were not intended to preempt state laws regulating carrier billing practices:

> [S]tates will be free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today. In addition to whatever powers they may have to enforce their rules under state law, states also have express authority under section 258 to enforce the Commission's verification procedure rules, including the principles and guidelines adopted here, with respect to intrastate services.

14 F.C.C.R. at 7507 ¶26.

B. PROCEEDINGS BELOW.

1. The FCC's Declaratory Ruling.

The FCC's 1999 Truth-in-Billing order failed to stem the tide of misleading and confusing carrier billing practices. More and more carriers – wireline and wireless alike – included more and more line item charges on customers' monthly phone bills, many of them misleadingly vague, ambiguous or suggesting the government rather than the carrier was responsible for the charge. After five years of FCC inaction, the National Association of State Utility Consumer Advocates ("NASUCA") petitioned the FCC to issue a declaratory ruling to rein in such billing practices. NASUCA alleged that carriers' so-called "regulatory" line item charges violated the FCC's Truth-in-Billing orders and should be prohibited unless mandated or authorized by federal, state or local governments. *See In re Truth-in-Billing and Billing Format*, NASUCA Petition, CC Docket No. 98-170 (March 30, 2004) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516085825); *see also id.*, NASUCA Reply Comments, CG Docket No. 04-208 (Aug. 13, 2004) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516287652).

The FCC sought public comment regarding NASUCA's petition. *See* 69 Fed. Reg. 33021 (June 14, 2004); *see also In re Truth-in-Billing & Billing Format*, Public Notice, 19 F.C.C.R. 9541 (2004). Numerous comments were filed by carriers, state regulators, consumer advocates and also by thousands of individual consumers. *See* Pet. App. 126-28a. In response to the evidence in the record indicating widespread customer complaints and confusion regarding wireless carriers' line item charges, the FCC eliminated some of the exemptions from its Truth-in-Billing rules for wireless carriers. Pet. App. 52-53a. In addition, the FCC initiated a further rulemaking proceeding to

consider adopting more stringent Truth-in-Billing rules for all carriers. *Id.* at 76-87a. Nonetheless, the FCC rejected NASUCA's petition. *Id.* at 58-59a.

Yet despite the fact that neither NASUCA's petition nor the FCC's public notices suggested preemption of state regulation was an issue, the FCC further declared that "state regulations requiring or prohibiting the use of [wireless] line items – defined here to mean a discrete charge identified separately on an end user's bill – constitute rate regulation and, as such, are preempted under [47 U.S.C. §332(c)(3)(A)]." Pet. App. 65-68a. In addition, the FCC sought comment in its further rulemaking regarding its tentative conclusion that it should preempt entirely state regulation of carriers' billing practices on the theory that "clearly discernible federal objectives . . . may be undermined by states' "non-rate" regulation of CMRS carriers' billing practices," and seeking comment regarding the "degree [to which] such 'conflict preemption' [can] be applied to *all* carriers under the provisions of the Act and other policy frameworks." *Id.* at 88-90a. (emphasis original). Both the Declaratory Ruling and Second Further Notice of Proposed Rulemaking portions of the FCC's order provoked strong dissents by two of the FCC's Commissioners. *See* Pet. App. 134-37a (Separate Statement of Commissioner Copps); *id.* at 138-40a (Separate Statement of Commissioner Adelstein).

2. The Eleventh Circuit's Decision.

NASUCA sought review of the Declaratory Ruling in the United States Court of Appeals for the Eleventh Circuit, pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The Vermont Public Service Board ("Vermont") filed a separate petition for review of the Declaratory Ruling in the United States Court of Appeals for the Second Circuit. Pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation ordered the two appeals consolidated in the Eleventh Circuit. The National Association of Regulatory Utility Commissioners ("NARUC") subsequently intervened

in support of Vermont's appeal. Petitioners, several other wireless carriers and the wireless industry's trade association intervened in support of the FCC's preemption ruling.

In a unanimous decision, the Eleventh Circuit granted the petitions for review and vacated the FCC's Declaratory Ruling.[5] The Eleventh Circuit first noted that "[a]lthough the presumption against preemption cannot trump our review of the [FCC] Order under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'" Pet. App. 23a. The court then concluded that the "language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." *Id.* at 25a. In reaching this conclusion, the court relied on "[a] straightforward reading of the complementary phrases 'regulate entry of or the rates charged' and 'other terms and conditions,'" in Section 332(c)(3)(A) which "evidence[] the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states." *Id.* (internal citation omitted). This is so, the court declared, because "[t]he prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. . . ." *Id.* at 26a. "Because the presentation of line items on a bill is not a 'charge or payment' for service," the court concluded, "it is an 'other term or condition' regulable by the states." *Id.* (internal citations omitted).

On petitions for panel rehearing filed by the FCC and the wireless intervenors, the court modified the final sentence of its order to clarify that the preemption determination in the Declaratory Ruling was vacated and remanded to the FCC, but in all other respects denied the petitions for rehearing. Pet. App. 36-37a. The Eleventh Circuit subsequently denied

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[5] The Eleventh Circuit also granted motions to dismiss Vermont's appeal but permitted NARUC to proceed as an intervenor in that appeal. Pet. App. 18a.

the wireless intervenors' petition for rehearing *en banc*. *Id.* at 34-35a. Petitioners then filed a motion for stay of the court's mandate, which the Eleventh Circuit also denied. *See* Resp. App. 1-2a.

Petitioners filed the instant petition for certiorari on February 27, 2007. The Solicitor General declined to file a petition with this Court seeking review on behalf of the FCC, declined to file a respondent's brief on the FCC's behalf in support of Petitioners pursuant to Sup. Ct. R. 12(6), and filed a waiver of the FCC's right to file a brief on March 28, 2007. Likewise, none of the other wireless intervenors below filed briefs supporting the instant petition. NASUCA and NARUC respectfully submit this Opposition.

REASONS FOR DENYING REVIEW

The Court grants certiorari "only for compelling reasons." Sup. Ct. R. 10. The instant petition provides none. It is clear from both the questions presented by Petitioners ("[w]hether the Eleventh Circuit erred . . . ") and their argument ("[t]he Eleventh Circuit's decision is rife with error"), that Petitioners seek certiorari based on the notion that the Eleventh Circuit's decision was erroneous, rather than on any direct conflict between that decision and decisions rendered by other appellate courts or this Court. It is generally understood, however, that the Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions," and that the Court "must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Address of Chief Justice Vinson before American Bar Association, 69 S.Ct. v-vi (Sept. 7, 1949); *see also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Petitioners fail to show that the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Finally, Petitioners' assertion that the Eleventh Circuit erred is simply wrong.

I. REVIEW OF THE ELEVENTH CIRCUIT'S HOLDING THAT THE FCC'S PREEMPTION RULING FAILS UNDER *CHEVRON* STEP ONE IS NOT WARRANTED.

A. THE ELEVENTH CIRCUIT'S ANALYSIS OF SECTION 332(C)(3)(A) UNDER *CHEVRON* DOES NOT PRESENT A CONFLICT WARRANTING REVIEW.

One of the primary purposes of the Court's certiorari jurisdiction is to address appellate court decisions that are in direct conflict with a decision of another federal appeals court on the same, important matter of federal law. *See* Sup. Ct. R. 10(a). Petitioners fail to set forth any basis for review of the Eleventh Circuit's determination, under *Chevron* Step One, that Section 332(c)(3)(A) unambiguously does not preempt state laws requiring or prohibiting wireless carriers' use of line items. No conflict between the Circuits in the Eleventh Circuit's application of *Chevron* Step One is alleged by Petitioners. This is unsurprising since the FCC itself noted that it had not previously addressed this question. Pet. App. 70-71a n.90 ("The Commission never has considered, however, where among section 332(c)(3)(A)'s key terms state regulation prohibiting or requiring line items should fall. *We address this issue for the first time in this item . . . .*").[6] Nor do Petitioners allege any conflict between the Eleventh Circuit's application of *Chevron* and this Court's decisions implementing that analysis.

Petitioners cite two district court decisions in the Ninth Circuit that deferred to the Declaratory Ruling, after its vacatur, and suggest those decisions may lead to a conflict in the Circuits. Pet. 17; *see Peck v. Cingular Wireless*, No. 06-30267 (9th Cir., appeal pending). Generally, however, differing decisions between district courts in one circuit and

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[6] Petitioners likewise fail to identify any conflict between the Eleventh Circuit's analysis of the FCC's preemption ruling under *Chevron* Step One, and decisions of this Court.

the appellate court in another circuit do not present the sort of conflict this Court reviews. Moreover, Petitioners concede that any conflict in the Circuits is hypothetical and that a conflict may very well fail to materialize.[7]

B. THE ISSUE DECIDED BY THE ELEVENTH CIRCUIT IS NOT OF PRESSING NATIONAL IMPORTANCE.

In the absence of any conflict warranting review, Petitioners invite the Court to grant their petition solely to review the merits of the Eleventh Circuit's decision by overstating the importance of the court's ruling. First, Petitioners exaggerate the alleged harms of State laws regulating the presentation of line items on wireless bills. Next, Petitioners wrongly suggest the Eleventh Circuit's decision altered the regulatory scheme governing States' authority over wireless service, when in fact it was the FCC's ruling that upset the federal-state regulatory balance.

1. Petitioners Overstate The Impact Of The Eleventh Circuit's Ruling.

Petitioners overstate the impact of the Eleventh Circuit's ruling by exaggerating the possible harm from States being able to prohibit, or for that matter require, inclusion of line items on wireless bills. Pet. 16-17.[8] For example,

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[7] Although appellants in *Peck* assert that the district court's deference to the vacated FCC's ruling was improper, they also cite numerous other grounds for reversal of the district court's decision, including state law-based arguments. As Petitioners concede, no conflict arises if the Ninth Circuit reverses the district court's decision to defer to a previously-vacated FCC order. Likewise, if the Ninth Circuit reverses the district court on those other grounds, no conflict arises.

[8] It is ironic that Petitioners couch their argument as an attempt to protect consumers since the FCC's Truth-in-Billing orders cited extensive consumer confusion and complaints regarding carrier line item charges, to which the agency inappropriately responded by eliminating States' ability to redress such billing practices. *See* Pet. App. 52-53a, 78a; *see also, e.g.*, 14 F.C.C.R. at 7494-96 ¶¶3-4. Petitioners' standing to seek review based on alleged harms to their customers seems dubious in any case.

Petitioners claim that the Eleventh Circuit's decision "will encourage state and local governments to adopt and hide taxes on wireless service . . . obstruct[ing] wireless carriers' ability to offer national rate plans." Pet. 2, 10. Petitioners also claim that "States and localities . . . have recently taken steps to hide those taxes and fees [they impose on wireless service] from consumers by prohibiting wireless carriers from using line items to collect them." *Id.* at 2, 4. There is no merit to Petitioners' claims.

First, Petitioners overlook the breadth of the FCC's ruling, which preempted any State laws requiring or prohibiting line items, including State or local taxes or regulatory fees. Petitioners also ignore the fact that States have legitimate purposes in enacting laws prohibiting or requiring line items by utilities, including wireless carriers, and other businesses. States often mandate line items for sales taxes, for example, to ensure orderly administration of the tax. A receipt that itemizes a sales tax is an efficient means to protect taxpayers from double liability for the tax and also assures exempt taxpayers, such as churches, that they have been properly excluded from the tax. States likewise have legitimate reasons for prohibiting certain line item charges, such as utility gross receipts taxes, including avoiding confusion about the taxable entity. For example, customers who receive a bill with a line item identified as a state gross revenue tax and who call the state tax department regarding the tax or amount charged may be advised only that the line item charge is not authorized by state law. Similarly, State officials may find it difficult to explain to a customer why the line item rate on the bill is higher than the utility's assessment.[9] Moreover, experience shows that the inherent

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[9] For example, to recover its cost from paying a gross revenue tax with a rate of R, the carrier would need to add a surcharge to the customer's bill equal to (R / (1-R). Thus, if the carrier paid a rate of 10% on its gross revenue, it would need to charge 11.1% to recover its payment.

complexity in recovering a gross revenues tax can, and historically has, produced overcharges.[10]

Petitioners also overstate the impact of State taxes on their national pricing plans. For one thing, it is unclear why Petitioners single out gross revenue taxes as a particular threat to wireless carriers' national pricing plans. National carriers' costs to provide service vary by state, and many of those costs, such as corporate income and property taxes, prevailing wages or real estate values, are likely to have a greater impact on wireless carriers' ability to offer national pricing plans than the relatively minor cost imposed by State gross revenue taxes. In addition, Petitioners fail to explain how their State-specific line item charges will relate to nationally-advertised service rates if the Eleventh Circuit is reversed. While Petitioners suggest consumers benefit from wireless carriers' ability to advertise one national rate, the national pricing they advocate is illusory. In practice, the amount consumers are billed is anything but nationally uniform since wireless carriers add unadvertised State-specific line item charges to consumers' bills. In other words, Petitioners claim national policy favors nationally-uniform pricing but jettison that notion in order to impose State-specific charges.

Second, Petitioners' angst over "hidden" State or local taxes is overblown. Petitioners ignore the fact that the Eleventh Circuit's decision does not prevent carriers from communicating with customers regarding State fees and taxes. The court's ruling does not interfere with carriers' recognized ability to provide customers with information or opinions regarding State and local taxes through non-

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[10] States' concerns that carriers may use line items to mislead consumers or over-recover taxes and fees are well-founded. *See, e.g., In re State of Texas v. Sprint Spectrum*, No. GV4-02057, Petition (Travis Co. Dist. Ct., Filed Feb. 5, 2007) (seeking to enjoin Petitioner Sprint Nextel's affiliate from characterizing as a state utility tax a line item charge imposed over a year before the tax's effective date); *see also Texas v. Sprint Spectrum*, Case 1:07-cv-00150-SS (W. D. Tex. April 11, 2007) (finding no preemption and remanding to state court).

misleading bill inserts. *See, e.g., Consolidated Edison v. New York Public Serv. Comm'n*, 447 U.S. 530 (1980). Aside from bill inserts, carriers retain many other avenues for communicating with the public regarding State and local taxes and fees. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Third, Petitioners' claim that States are imposing hidden taxes on wireless consumers with increasing frequency is not supported by the record. The FCC cited no such "increasing" effort by State and local governments as the basis for its Declaratory Ruling, noting only three State laws prohibiting carriers from passing certain regulatory fees or taxes through to consumers as line item charges. Pet. App. 68a n. 87.[11] Those laws were of long-standing and were not targeted at wireless carriers, being imposed either on utilities generally or on telecommunications carriers. For example, Indiana's law prohibiting utilities' pass-through of the State's gross utility tax, though enacted in 2002, merely increased the tax previously in effect by 0.2%. *See* Pet. App. 159-60a.[12] Until the FCC's ruling, State and local governments had the power to prohibit or mandate line items on, wireless carriers' bills.[13] This authority extended to taxes, other regulatory

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[11] The FCC also preempted a Colorado statute requiring carriers to pass through contributions to the State's universal service fund. Pet. App. 68a n. 88. Despite their avowed desire to protect consumers from hidden taxes or fees, Petitioners inexplicably support preemption of the Colorado law even though it did "not present the serious practical problems caused by *prohibitions* on the use of line items." Pet. 6 n.3 (emphasis original).

[12] The other state laws cited by the FCC were likewise long-standing. For example, Vermont's rule had been in effect since 1991. *See Petition of Dept. of Public Service for a Declaratory Ruling Concerning the Applicability of 30 V.S.A. § 22*, Docket No. 5464, 1991 WL 736274 (Vt. P.S.B. March 8, 1991). The Georgia law prohibiting telecommunications carriers (wireless and wireline) from passing contributions to the State's universal service fund through as line item charges was adopted in 1995. *See* Ga. Code Ann. § 46-5-167(h).

[13] A fact noted by the dissents to the FCC order. *See* Pet. App. 135-36a ("It will take some time for states to survey the debris from this erosion of

assessments, and indeed, any billing practice that was deceptive, misleading or unreasonable. Nothing in the record or Petitioners' argument suggests that States have misused this power or that they are likely to misuse it in the future.

2. Petitioners Mischaracterize The 1993 Amendments To Section 332(c)(3).

Petitioners also exaggerate the impact of the Eleventh Circuit's ruling on the wireless regulatory scheme by mischaracterizing Congress' purposes in enacting the 1993 amendments to the Act. For example, Petitioners assert that the court's decision "threatens to limit the FCC's ability to implement the deregulatory scheme Congress adopted." Pet. 20. Likewise, Petitioners assert that, in amending Section 332(c)(3), "Congress eliminated the traditional limitation on federal authority over intrastate communications services insofar as they relate to the provisions of wireless service." *Id.* at 18.[14] Both assertions are wrong.

As previously noted, *supra* pp. 4-6, a primary purpose of the 1993 amendments to the Act was not to introduce a deregulatory scheme governing wireless service but rather to eliminate the disparate treatment of providers of "private" and "public" mobile services that often were indistinguishable from one another and instead, to regulate those carriers in a consistent manner. A second, but by no means secondary, purpose of the 1993 amendments was to ensure that consumers would not be denied protection if new wireless services were classified as "private" under the former regulatory scheme. The 1993 amendments served both purposes by bringing formerly "private," unregulated wireless

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cooperative federalism."); *id.* at 139a ("By preempting states, our historic partners in consumer protection, this Order curtails States' ability to moderate line items on consumers' wireless phone bills.").

[14] As authority for this proposition, Petitioners cite no less an objective source than a law journal article authored by Sprint Nextel's general counsel.

services within the federal-state regulatory scheme established in the Act, and by ensuring that States retained their ability to protect consumers pursuant to their jurisdiction over "other terms and conditions" of wireless service. Moreover, though States were preempted from regulating commercial wireless "entry," Congress expressly provided for the resumption of "rate" regulation of such service if certain market conditions existed or if consumers were harmed thereby. State regulation of wireless billing practices, including line items on customers' bills under their "other terms and conditions" authority does not threaten this regulatory scheme.

Likewise, Petitioners err when they assert that the 1993 amendments "eliminated the traditional limitation on federal authority over intrastate communications services insofar as they relate to the provisions of wireless service," and that "section 332(c)(3)(A) did not *preserve* anything." Pet. 18, 20-21 (emphasis original). When Congress amended Section 332(c)(3)(A) of the Act to preempt States from regulating the "entry of" or "rates charged by" commercial wireless service, it made clear that such preemption applied "notwithstanding sections 152(b) and 221(b)" of the Act. *See* 47 U.S.C. § 332(c)(3)(A). This language did not eliminate State jurisdiction over intrastate wireless service, it simply recognized that, but for the preemption clause in Section 332(c)(3)(A), States otherwise would have retained jurisdiction over commercial wireless rates and entry. Nor can the language of section 332(c)(3)(A) be read to give the FCC power over intrastate "terms and conditions" of wireless service, something expressly denied it under section 152(b) of the Act. *See Louisiana PSC*, 476 U.S. at 374; *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 381 n.7 & 8 (1999).

Finally, if the consequences of the Eleventh Circuit's decision were as dire as Petitioners suggest, then the FCC presumably would have sought review of the vacated Declaratory Ruling itself. The fact that the Solicitor General did not file a petition for certiorari on the FCC's behalf, did

not file a respondent's brief in support of Petitioners' effort to obtain review, and affirmatively waived the United States' right to file a respondent's brief, speaks volumes to the purportedly sweeping import of the Eleventh Circuit's decision.

3. Review Is Not Necessary At This Time.

In any event, the notion that the Court must review the Eleventh Circuit's decision in order to uphold Congress' "deregulatory" objectives is wrong. *See* Pet. 20. As Respondents previously noted, the FCC initiated a further rulemaking in conjunction with its Declaratory Ruling in which it tentatively concluded that it may preempt all State laws regulating carrier billing practices – wireless or wireline – on the grounds such laws conflict with the FCC's scheme for truth-in-billing regulation. Pet. App. 88-91a. That rulemaking is pending. If the FCC adopts its tentative conclusion its decision undoubtedly will be appealed, first to the Circuit Courts and eventually to this Court. The Court should allow the administrative process, and any Circuit Court appeals, to run their course before taking up the question of whether preemption of the State laws should be implied because they allegedly stand as obstacles to the full achievement of Congress' purposes.

C. THE ELEVENTH CIRCUIT'S ANALYSIS UNDER *CHEVRON* WAS CORRECT IN ANY EVENT.

In any event, the Eleventh Circuit's decision was correct on the merits and does not warrant review by the Court.

The appeals court first set forth the proper analytical framework for its review of Section 332(c)(3)(A) and the FCC's Declaratory Ruling under *Chevron* Step One. Pet. App. 12a. Step One of *Chevron*, the court noted, required it to determine whether Congress had "directly spoken to the precise question at issue." Pet. App. 23a (internal citation

omitted). To do this, the appellate court noted, courts "employ[] traditional tools of statutory construction" (*e.g.*, assigning statutory terms their ordinary meaning and reviewing relevant legislative history) and that, while some deference is given to agencies' interpretation of their statutes, "courts are the final authorities on issues of statutory construction." *Id.* at 24a (internal citations omitted). Finally, the Eleventh Circuit noted, "it must consider the "context in which the term is used" in order to determine whether a statutory term is clear and unambiguous." Pet. App. 24a (internal citation omitted).

The Eleventh Circuit also set out the proper framework for analyzing whether Section 332(c)(3)(A) of the Act expressly preempted the State laws in question. Pet. App. 21a. The court correctly noted that, in the case of preemption, "'the purpose of Congress is the ultimate touchstone' of pre-emption analysis" and "any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." *Id.* at 22a (internal citations omitted). The Eleventh Circuit started "with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." Pet. App. 22a (internal citation omitted). Such laws, the court correctly noted, should not be deemed preempted absent a clear, unmistakable statement of Congress' preemptive intent or that the nature of the regulated subject matter permits no other conclusion. Pet. App. 22-23a. Applying these precedents, the Eleventh Circuit correctly observed that "[a]lthough the presumption against preemption cannot trump our review of the [Declaratory Ruling] under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'" Pet. App. 23a.

Having set out the proper analytical framework for its review of Section 332(c)(3)(A), the Eleventh Circuit turned to the FCC's Declaratory Ruling. Although it recognized that

"rates charged" was not defined in the Act, the court concluded that "the meaning of this term is clear in this context" and that "a straightforward reading of the complementary phrases 'regulate entry of or rates charged' and 'other terms and conditions' . . . evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states. . . ." *Id.* The court first considered the "ordinary, contemporary, common meaning" of "rates" by reference to several dictionaries, and concluded that a "rate" is generally understood to be a "charge or payment" for a particular good or service. Pet. App. 25-26a. This understanding was consistent, the court noted, with prior FCC statements distinguishing "rates" from "line items." *Id.* at 27a. Likewise, the Eleventh Circuit dismissed the notion advanced by the FCC that, based on agency statements in other contexts, line items were "rate levels" or "rate structures," or "rate elements," noting that such specific components of "rates" did not "magically expand the authority of the [FCC] beyond what the statutory language allows." *Id.* at 28 & 30a. The Eleventh Circuit also concluded that the FCC misconstrued the legislative history of Section 332(c)(3)(A), which made it clear that Congress meant "other terms and conditions of" wireless service regulated by States to be broadly construed. Pet. App. 31a. Finally, while the court agreed that "the substance, not merely the form" of a State's regulation governs whether it is rate regulation, it concluded that the FCC "does not articulate the 'substance' that distinguishes whether a regulation of line items is a billing practice or rate regulation." *Id.* at 31-32a.

Ultimately, the Eleventh Circuit correctly concluded that "[t]he interpretation of 'rates' urged by the [FCC] deprives the complementary phrase 'other terms and conditions' of all meaning," in violation of the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Pet. App. 32a, *quoting TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under the FCC's interpretation, the

court noted, "even powers historically retained by the states, such as the imposition of state taxes, would be preempted so long as they impact 'how carriers recover [the] costs of doing business." The FCC's failure to delineate the proper scope of rate regulation, the appellate court noted, allowed the FCC "indefinitely to expand its authority without regard to the mandate by Congress that 'other terms and conditions' remain the realm of state regulation." *Id.*

II. THE ELEVENTH CIRCUIT'S REFERENCE TO THE PRESUMPTION AGAINST PREEMPTION DOES NOT WARRANT REVIEW.

Rather than presenting any direct conflict involving the Eleventh Circuit's ruling that section 332(c)(3)(A) does not preempt state laws requiring or prohibiting wireless line items, Petitioners seek to manufacture one by asserting – at the very end of their brief – that the Eleventh Circuit's reference to the presumption against preemption conflicts with either the Sixth Circuit's judgment in *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005) or this Court's decision in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). Pet. 22-23. The Eleventh Circuit's reference to the presumption against preemption conflicts with neither decision.

As a threshold matter, the issue is entirely academic. Although the Eleventh Circuit applied a presumption against preemption in its analysis of Section 332(c)(3)(A), there is no reason to believe the court's holding would have been different had it not applied the presumption. To the contrary, the court of appeals concluded that "[a] straightforward reading" of the statutory provision at issue "evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states." Pet. App. 25a (internal citation omitted). Once the court turned from general principles to Section 332(c)(3)(A) itself, it looked principally at "common definition[s]" and the "express language" of the statutory terms. Pet. App. 32a. A grant of certiorari to review

the Eleventh Circuit's use of the presumption against preemption would produce nothing more than an advisory opinion.

Nor is there any reason, as Petitioners tentatively suggest, to grant certiorari, vacate the Eleventh Circuit's judgment, and remand for further consideration given this Court's recent ruling in *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (April 17, 2007). The Court in *Watters* did not reach the question whether agency regulations purporting to preempt state law should receive *Chevron* deference. "This argument is beside the point," the Court stated, "for under our interpretation of the statute, the level of deference owed to the regulation is an academic question." *Watters*, slip op. at 16. Nothing in the Court's opinion in *Watters* contradicts the Eleventh Circuit's opinion here.

A. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE PRESUMPTION AGAINST PREEMPTION.

The Eleventh Circuit's reference to the presumption against preemption as a guide for its analysis of section 332(c)(3)(A) does not conflict with the Sixth Circuit's decision in *Watters* in any way.[15] The two courts dealt with two very different types of preemption. Contrary to Petitioners' suggestion, the Sixth Circuit did not reject the presumption against preemption as always inapplicable to agency actions. Rather, the court noted that the State "correctly asserted that there is a presumption against preemption in areas of regulation typically left to the states" but concluded the presumption did not apply to "'conflict preemption' . . . where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Watters*, 431 F.3d 556, 560 & n.3,

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[15] In light of the Court's recent ruling in *Watters*, affirming the Sixth Circuit's decision on other grounds, Petitioners' claim that the Sixth Circuit's decision conflicts with the Eleventh Circuit's ruling may well have been rendered moot.

citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153-54 (1982).

In contrast, the FCC's ruling was based entirely on the notion that Congress expressly preempted state laws requiring or prohibiting wireless carriers' use of line item charges when it amended section 332(c)(3)(A) of the Act to prohibit state regulation of "rates charged by" wireless carriers." *See* Pet. App. 65-66a, 70-72a. To remove any doubts, the FCC distinguished the express preemption it found from any implied preemption that it believed – but did not conclude – might also apply:

> Even setting aside the preemptive effect of section 332(c)(3), we note that the type of state regulations described above also may be subject to preemption because they conflict with established federal policies. It is recognized widely that federal law preempts state law where, as here, the state law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," or of federal regulations.

Pet. App. 74a. And in contrast to *Watters,* the FCC's Declaratory Ruling was not based on any assertion of *de la Cuesta* authority but instead was based solely on the agency's interpretation of the preemptive scope of Section 332(c)(3)(A) of the Act. Pet. App. 65-68a.[16] Indeed, the FCC only referred to *de la Cuesta* in the portion of its order "noting" that preemption of state laws requiring or prohibiting line items "might" also be implied. *Id.* at 74a n.100.

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[16] In its brief below, the FCC rejected any suggestion that its Declaratory Ruling was based on implied preemption. Brief for FCC at 45-47. The wireless intervenors likewise rejected this suggestion. Brief for Wireless Intervenors at 37-38.

The subject matter of the regulation is yet another relevant distinction between the Sixth Circuit decision in *Watters* and the Eleventh Circuit's decision. The Sixth Circuit noted that the presumption against preemption "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time," such as regulation of federally chartered banks. *Watters*, 431 F.3d at 559 n.2 (internal quotations and citations omitted). Whether or not that conclusion is correct, it does not conflict with the Eleventh Circuit's application of the presumption to the entirely different field of utility billing practices, an area of traditional State regulation expressly preserved by Congress in the Act. *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

B. THE ELEVENTH CIRCUIT'S REFERENCE TO THE PRESUMPTION AGAINST PREEMPTION DOES NOT CONFLICT WITH THIS COURT'S RULINGS.

There is no conflict between the Eleventh Circuit's decision that its review of the Declaratory Ruling under *Chevron* should be "guided" but not "trumped" by the presumption against preemption, and this Court's ruling in *Smiley*. Pet. App. 23a. The Eleventh Circuit's observation that the presumption does not "trump" its analysis under *Chevron* clearly does not conflict with the Court's opinion in *Smiley*. *See Smiley*, 517 U.S. 743-44 (rejecting argument that the presumption against preemption "in effect trumps *Chevron*"). Nor is the Eleventh Circuit's observation that its analysis under *Chevron* Step One is guided by the presumption against preemption in conflict with the Court's ruling in *Smiley* because the Court did not address that question.

The Court in *Smiley* did not repudiate the presumption against preemption that courts utilize in determining a statute's preemptive effect and scope under *Chevron* Step One, but rather found the presumption inapplicable to the case

before it. In *Smiley*, the Office of the Comptroller of the Currency ("OCC") adopted a regulation defining "interest" to include late-payment charges.[17] Though the regulation merely defined a substantive term in the National Bank Act, the statutory provision it implemented (*i.e.*, 12 U.S.C. § 85) clearly was preemptive. *Smiley*, 517 U.S. at 737. The Court rejected the petitioner's claim that the "presumption against preemption" *required* the Court to undertake its own interpretation of the statute in determining whether the OCC exceeded its statutory authority in promulgating the regulation, noting:

> This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is preemptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is not the question at issue here; there is no doubt that § 85 preempts state law. . . . What *is* at issue here is simply the meaning of a provision that does not (like the provision in *Cipollone*) deal with preemption, and hence does not bring into play the considerations petitioner raises.

Id. at 743-44 (emphasis original).

In contrast, the FCC's Declaratory Ruling clearly represented the agency's determination of the preemptive

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[17] The agency action under review likewise distinguishes *Smiley* from the case below. The Court in *Smiley* noted that "we have before us here a full-dress regulation, issued by the [OCC] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741. The same cannot be said of the FCC's preemption ruling, which was adopted without any prior notice. *See* Pet. App. 139a; *see also* 69 Fed. Reg. 33021 (June 14, 2004); *see also In re Truth-in-Billing & Billing Format*, Public Notice, 19 F.C.C.R. 9541 (2004).

meaning of Section 332(c)(3)(A). The FCC's ruling cannot be equated with a regulation defining a substantive term of the Act, which then happened to be preempted by section 332(c)(3)(A). In short, the FCC was addressing the latter question noted in *Smiley*, *i.e.*, whether the relevant statute is preemptive. The Eleventh Circuit's reference to the presumption against preemption as a "guide" in its analysis of Section 332(c)(3)(A) was entirely consistent with *Smiley*.[18]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 7, 2007

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[18] In this Court's recent decision in *Watters*, the three dissenting Justices addressed the relationship between *Chevron* and the presumption against preemption and agreed with the Eleventh Circuit's approach. *Watters*, slip op. at 20-21 (Stevens, J., dissenting) ("when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference"). As noted, the majority in *Watters* did not address the issue.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Dec. 14, 2006]

No. 05-11682-DD

NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES,
Petitioner,

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
Intervenor-Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

AT&T CORPORATION, CINGULAR WIRELESS, INC., LEAP WIRELESS INTERNATIONAL, INC., NEXTEL COMMUNICATIONS, INC., SPRINT CORPORATION, T-MOBILE USA, INC., VERIZON, CELLULAR TELECOMMUNICATIONS and INTERNET ASSOCIATION,
Intervenors-Respondents.

No. 05-12601-DD

VERMONT PUBLIC SERVICE BOARD,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Petition for Review of Decisions of the
Federal Communications Commission

ORDER:

(X) The motion of Intervenors, Sprint Nextel Corporation. and T-Mobile, USA, Inc., for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Intervenors, Sprint Nextel Corporation and T-Mobile, USA, Inc. , for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 7, 2007, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX B

TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

APPENDIX C

TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5—WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication

solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

No. 06-1184

In the Supreme Court of the United States

SPRINT NEXTEL CORPORATION, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Communications Commission reasonably interpreted Section 332(c)(3)(A) of the Communications Act of 1934, 47 U.S.C. 332(c)(3)(A), which denies States "any authority to regulate * * * the rates charged" by a commercial mobile telephone service provider, to preempt States from requiring or prohibiting separate discrete charges, or "line items," on the bills of wireless telephone carriers.

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In the Supreme Court of the United States

No. 06-1184

SPRINT NEXTEL CORPORATION, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, provides a federal framework for the regulation of communications services, including wireless telephone services. Title III of the Act, 47 U.S.C. 301 *et seq.*, gives the Federal Communications Commission (FCC or Commission) the exclusive authority to license the radio frequencies used in wireless communications. 47 U.S.C. 301, 303. In the exercise of that authority, the Commission has set aside and licensed radio frequencies for wireless telephone

service since the mid-1970s. See, *e.g.*, *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 525 F.2d 630, 636-637 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

Until 1993, wireless common-carrier services—including cellular telephone service—were subject to the same system of dual state and federal regulation that governs traditional wireline telephone services. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). Section 2(b) of the Communications Act, 47 U.S.C. 152(b), reserved to the States the authority to regulate *intrastate* common-carrier services, and a number of States required wireless carriers to set their intrastate rates in tariffs filed with public utility commissions. See, *e.g.*, *In re Petition on Behalf of the State of Haw., Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7879-7880 ¶¶ 30-38 (1995) (*Hawaii Pub. Util. Comm'n*). State regulation of intrastate wireless rates included oversight of the rate structures for those services.[1] See, *e.g.*, *Connecticut Dep't of Pub. Util. Control* v. *FCC*, 78 F.3d 842, 847 (2d Cir. 1996); *In re Nationwide Cellular Serv., Inc.* v. *Public Serv. Comm'n*, 583 N.Y.S.2d 852, 853 (App. Div. 1992). In contrast, *interstate* wireless rates were regulated by the Commission under Title II of the Communications Act, 47 U.S.C. 201 *et seq.* Title II imposes

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[1] A rate structure encompasses the manner in which a carrier expresses and calculates its charges for particular services. See *In re AT&T*, 74 F.C.C.2d 226, 235 (1979). "The pricing mechanisms employed to determine rates and charges as well as any interrelationships which exist among rate elements are part of rate structures." *In re AT&T*, 84 F.C.C.2d 158, 182 n.52 (1980). Individual "[r]ate elements are the basic building blocks of rate structures." *Ibid.*; accord *AT&T*, 74 F.C.C.2d at 235. While a rate structure may consist of only a single rate element, it also may include two or more discrete rate elements, such as a monthly fee, a per-minute charge, or a separate charge designed to pass through the costs of a tax.

a number of specific obligations on common carriers, including the filing of tariffs with the Commission to establish the rates, terms, and conditions of interstate service. 47 U.S.C. 203.

In 1993, Congress amended the Communications Act "to dramatically revise the regulation of the wireless telecommunications industry." *Cellnet Commc'ns, Inc.* v. *FCC*, 149 F.3d 429, 433 (6th Cir. 1998); see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b)(2), 107 Stat. 392 (47 U.S.C. 332). The amendments created two new regulatory categories of wireless service: "commercial mobile service" and "private mobile service." 47 U.S.C. 332(d)(1) and (3).[2]

Section 332(c)(3)(A) denies the States "any authority to regulate the entry of or the rates charged by any" commercial or private mobile service providers. 47 U.S.C. 332(c)(3)(A). At the same time, Congress said that in enacting that provision it was not preempting state and local regulation of "other terms and conditions" of wireless service. *Ibid.* Congress also provided States with the ability to petition the Commission for permission to regulate commercial mobile service rates, and it directed the Commission to grant such permission if the State demonstrates that "market conditions * * * fail to protect subscribers adequately from unjust and

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[2] "[C]ommercial mobile service" includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. 332(d)(1). The Commission's regulations refer to the commercial mobile services defined by the Act as "commercial mobile radio service," or "CMRS," 47 C.F.R. 20.3; they are more commonly known as cellular telephone services or commercial wireless telephony.

unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. 332(c)(3)(A)(i).

The 1993 amendments reflect a "general preference in favor of reliance on market forces rather than regulation." *In re Petition of N.Y. State Pub. Serv. Comm'n*, 10 F.C.C.R. 8187, 8190 ¶ 18 (1995). Thus, although cellular services are subject to Title II of the Communications Act, the Commission is authorized to forbear from regulating them under provisions of that Title if certain specified consumer-protection and public-interest criteria are satisfied. 47 U.S.C. 332(c)(1)(A).

The Commission has exercised its forbearance authority to exempt cellular providers from filing interstate tariffs. 47 C.F.R. 20.15(c); *In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Servs.*, 9 F.C.C.R. 1411, 1480 ¶ 179 (1994). In addition, the Commission consistently has denied States permission to regulate cellular rates and entry, concluding in each case that the States had failed to demonstrate that market forces were inadequate to protect consumers. See, *e.g.*, *In re Petition of Conn. Dep't Pub. Util. Control*, 10 F.C.C.R. 7025, 7059 ¶ 77 (1995), petition for review denied, 78 F.3d 842 (2d Cir. 1996); *Hawaii Pub. Util. Comm'n*, 10 F.C.C.R. at 7872; *In re Petition of the State of Ohio*, 10 F.C.C.R. 7842, 7852 ¶ 39, reconsideration denied, 10 F.C.C.R. 12,427, 12,439 ¶ 25 (1995).

The rates that cellular providers charge their customers thus are generally governed "by the mechanisms of a competitive marketplace," in which rates and terms of service are established by contract rather than by regulation. *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 17,032 ¶ 20 (2000). Cellular providers typically operate without regard to state borders and, in

contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis. A number of cellular operators with national networks offer national rate pricing plans, while others offer pricing plans on a multi-state, regional basis. *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 21 F.C.C.R. 10,947, 10,959 ¶ 25, 10,967 ¶ 50, 10,983-10,984 ¶¶ 90-91 (2006).

2. In March 2005, the Commission issued a declaratory ruling construing Section 332(c)(3)(A)'s prohibition on state rate regulation of cellular providers to preempt state regulations that either prohibit or require the use of "line items"—defined as "discrete charge[s] identified separately on an end user's bill." Pet. App. 65a.

The Commission explained that Section 332(c)(3)(A) does not "specifically define 'rates,' 'entry,' or other key terms." Pet. App. 66a. The Commission pointed out, however, that it has consistently interpreted the statute broadly, barring States not only "from prescribing 'how much may be charged'" for cellular service, but also from prescribing "rate structures" and "rate elements." *Ibid.* (citation omitted). The Commission also noted that its prior statements had equated "line items" with "rate elements." *Id.* at 66a-67a (citing *In re Access Charge Reform*, 15 F.C.C.R. 12,962, 13,057 ¶ 218 (2000), aff'd in part and rev'd in part *sub nom. Texas Office of Pub. Util. Counsel* v. *FCC*, 265 F.3d 313 (5th Cir. 2001), cert. denied, 535 U.S. 986 (2002)); *In re Federal-State Joint Bd. on Universal Serv.*, 17 F.C.C.R. 24,952, 24,979 ¶ 54 (2002), reconsideration granted, 18 F.C.C.R. 4818 (2003).

The Commission explained that state regulations either prohibiting or requiring the recovery by a wireless carrier of specific costs through a separate line item

"clearly and directly affect the manner in which the * * * carrier structures its rates." Pet. App. 68a; see *id.* at 69a. For example, the Commission pointed out that a state prohibition on line items regulates the structure of a carrier's rates by permitting recovery of costs only through "an undifferentiated charge for service." *Ibid.* Conversely, the Commission noted, a state requirement that carriers "segregate particular costs into line items * * * similarly would limit a carrier's ability to set and structure its rates" by compelling the disaggregation of rate elements. *Ibid.* The impact on rates of state line-item regulation is "particularly evident," the Commission explained, when one "consider[s] that most [cellular] carriers * * * market and price their services on a national basis." *Ibid.* Absent preemption, the Commission found, a "carrier forced to adhere to a varying patchwork of state line item requirements * * * would be forced to adjust its rate structure from jurisdiction to jurisdiction." *Ibid.*

Apart from the preemptive effect of Section 332(c)(3)(A), the agency also observed that state regulations prohibiting or mandating line items "may be subject to preemption because they conflict with established federal policies." Pet. App. 74a. The Commission stated that state line-item requirements and prohibitions might be inconsistent with the "uniform, national, and deregulatory framework" for cellular telephone service established by Congress and the Commission, in which "prospective rates are established by the * * * carrier and customer in service contracts, rather than dictated by federal or state regulators." *Id.* at 74a-75a. The Commission noted that there was a "significant possibility" that such regulation would subject providers to a variety of disparate state requirements and prohibitions, which

would "undermine the benefits derived from allowing * * * carriers the flexibility to design national or regional rate plans." *Id.* at 75a. The Commission, however, did not make any final decision on conflict preemption, instead soliciting further comment on the question. *Id.* at 61a-65a.

The Commission decided not to issue a federal rule prohibiting carriers from assessing any line item not authorized or mandated by the government, as respondent National Association of State Utility Consumer Advocates (NASUCA) had proposed. Pet. App. 58a-59a. The Commission explained that "the provision of accurate and non-misleading information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers." *Id.* at 59a. The Commission made clear, however, that misleading line items were an unjust and unreasonable practice proscribed by Section 201(b) of the Communications Act, 47 U.S.C. 201(b). Pet. App. 61a-62a.

The Commission emphasized that its preemption ruling had no effect on the ability of States to levy and collect taxes or to create state universal-service support mechanisms to which cellular providers and other telecommunications carriers must contribute. Pet. App 56a-57a, 70a, 71a. The Commission also explained that its ruling applied only to state regulations that prohibited or required line items, thereby leaving undisturbed other forms of state regulation, including state truth-in-billing requirements that are consistent with federal rules. *Id.* at 72a. And the agency emphasized that its ruling did not prevent state regulations governing the disclosure of rates set by cellular providers or the neu-

tral application of state contractual or consumer fraud laws. *Ibid.*

In a separate section of its order, the Commission instituted a rulemaking to consider "the broader issue of the role of states in regulating billing," among other issues. Pet. App. 76a. The Commission invited parties to comment on the "proper boundaries of 'other terms and conditions' under section 332(c)(3)(A) of the Act" and the "relative roles of the Commission and the states in defining carriers' proper billing practices." *Id.* at 91a. The Commission specifically asked parties whether it should preempt state regulation of carriers' billing practices beyond line items, and the degree to which "conflict preemption" can be applied to all carriers under the Communications Act and the Commission's policies. The Commission also sought comment on whether requiring carriers to conform to a multitude of disparate state billing requirements relating to customer disclosure and details in bills stifles competition and unreasonably burdens interstate commerce. *Id.* at 89a. In addition, the Commission asked parties to address whether Sections 201(b) and 205(a) of the Communications Act, 47 U.S.C. 201(b), 205(a), give the Commission express authority to preempt state regulations that prescribe "billing format and content, including line-item charges." Pet. App. 90a.[3]

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[3] Section 201(b) requires "[a]ll charges, practices, classifications, and regulations for and in connection with" an interstate communications service to be "just and reasonable." 47 U.S.C. 201(b); see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1520-1522 (2007). Section 205(a) authorizes the Commission, upon finding that any such charge, classification, regulation, or practice violates any provision of the Communications Act, to prescribe a "just, fair, and reasonable" charge, classification, regulation, or practice

3. Respondent NASUCA petitioned for review, and respondent National Association of Regulatory Utility Commissioners intervened in support of NASUCA, while petitioner Sprint Nextel, joined by other wireless carriers, intervened in support of the FCC. The court of appeals vacated the Commission's preemption ruling. Pet. App. 1a-33a, 36a-37a.

The court of appeals concluded that "[t]he language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." Pet. App. 25a. Acknowledging that the Communications Act does not define the phrase "rates charged," the court held, after examining several dictionary definitions, that the phrase denotes the "amount of a charge or payment." *Ibid.* In the court's view, "[t]he prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service." *Id.* at 26a. In other words, "[s]tate regulations of line items regulate the billing practices of cellular wireless providers," and "not the charges that are imposed on the consumer." *Ibid.* "Because the presentation of line items on a bill is not a 'charge or payment' for service * * * it is an 'other term or condition' regulable by the states." *Ibid.* (citation omitted).

The court of appeals also held that the Commission "failed adequately to explain its conclusion that a line item falls within the definition of 'rates' because the use of line items has an alleged direct effect on rates." Pet. App. 28a. The fact that a state "prohibition or require-

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"to be thereafter followed" and to order carriers to "cease and desist from such violation." 47 U.S.C. 205(a).

ment of a line item has some effect on the charge to the consumer," the court stated, does not necessarily establish that it regulates "rates" and place it "outside the ambit of state regulation of 'other terms and conditions.'" *Ibid.* The court noted that the Commission has held that state regulations requiring cellular providers to contribute to state universal service funds are not barred by Section 332(c)(3)(A) because such regulations affect rates only indirectly. *Id.* at 29a (citing *In re Petition of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735 (1997), aff'd *sub nom. Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332 (D.C. Cir. 1999)). The court failed to see any "logical distinction between what the Commission terms a 'direct effect' caused by the regulation of line items and the alleged 'indirect effect' caused by the imposition of universal service charges." *Ibid.*

Finally, the court of appeals expressed concern that the Commission's interpretation of the phrase "rates charged" in Section 332(c)(3)(A) to include matters having to do with "the presentation of line items on consumers bills" would "deprive[] the complementary phrase 'other terms and conditions' of all meaning" and would leave the Commission "free to preempt virtually any form of state regulation of wireless service, including laws regarding disclosure and consumer protection." Pet. App. 32a. Indeed, the court asserted that the Commission's interpretation of Section 332(c)(3)(A) would result in the preemption of "powers historically retained by the states, such as the imposition of state taxes," so long as they, too, had an impact on the way in which cellular providers recover their costs. *Ibid.*[4]

[4] In response to the FCC's petition for panel rehearing, the panel modified its decision to make clear that its decision vacated only that portion of the Commission's order that contained the preemption

DISCUSSION

The court of appeals erred by not according appropriate deference to the FCC's reasonable construction of Section 332(c)(3)(A), but its decision does not warrant further review at this time. The Commission has a pending proceeding on whether there are other bases for the preemption of state regulations mandating or prohibiting line items in cellular telephone bills. For that reason, the decision below is not of sufficient continuing importance at present to warrant the Court's attention.

A. The Decision Below Is Incorrect

1. The court of appeals erred in vacating the Commission's determination that Section 332(c)(3)(A) bars States from requiring or prohibiting line items in wireless bills. Pet. App. 25a-33a. Section 332(c)(3)(A) denies States "any authority to regulate * * * the rates charged" by a cellular provider, but it does not preempt their regulation of "other terms and conditions" of wireless service. That provision, however, "never states what constitutes rate * * * regulation or what comprises other terms and conditions of wireless service." *Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332, 1334, 1336 (D.C. Cir. 1999). By leaving gaps as to "the scope and definition of statutory terms," Congress implicitly delegated authority to the Commission to elucidate the statute's meaning. *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2346 (2007); see *National Cable & Telecomms. Ass'n* v. *Brand X Internet*

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ruling, and that the effect of the decision was to remand the case to the Commission. Pet. App. 36a-37a. Thereafter, the court denied petitions for rehearing *en banc* filed by the intervenors representing wireless carriers. *Id.* at 34a-35a.

Servs., 545 U.S. 967, 980 (2005); *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). The court of appeals should have accepted the agency's reasonable interpretation of the statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980; see *Chevron*, 467 U.S. at 843-844 & n.11. The court of appeals erred in failing to defer to the FCC's reasonable construction of Section 332(c)(3)(A).

The court of appeals discussed the "presumption against preemption," Pet. App. 23a, but that principle does not justify the court's failure to defer. First, the court of appeals itself correctly recognized that the presumption cannot "trump" the *Chevron* standard of review in this case. *Ibid.* Moreover, the presumption is of little help in interpreting an *express* preemption provision like Section 332(c)(3)(A). See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495 (1996) (explaining that "our interpretation of the pre-emption statute" in the Medical Device Amendments of 1992, Pub. L. No. 102-30, 106 Stat. 238, "is substantially informed by" FDA regulations, and citing *Chevron*). And, in any event, the presumption is out of place here because the "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 88 (2006). Cellular telephone service can be provided only through the use of radio frequencies licensed by the FCC, see 47 U.S.C. 301, 303, and thus there has been a significant federal role in the regulation of such service since its inception.

2. The court of appeals relied upon the definition of "rate" in several dictionaries as "[a]n amount paid or charged for a good or service," Pet. App. 25a, but that definition does little to eliminate the inherent ambiguity concerning the treatment of a line item in a cellular bill. Even if "rate" had a single unambiguous meaning—which it does not, see, *e.g.*, *Webster's Third New International Dictionary* 1884 (1993) (listing 7 definitions of "rate" as a noun)—"[a]mbiguity is a creature * * * of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). The Commission did not interpret the word "rate" in isolation and find that term to be synonymous with line items. Instead, it construed the statutory phrase "regulate * * * the rates" in accordance with the established meaning of that phrase in utility regulation—namely, that rate regulation is not limited to the review of the dollar amount charged by the carrier, but includes oversight of the carrier's rate structure and the individual elements of that rate structure.[5] Pet. App.

[5] Traditionally, "[t]he establishment of a rate for a regulated industry" has involved not only "the adjustment of the general revenue level to the demands of a fair return" but also "the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584 (1942); see *Permian Basin Area Rate Cases*, 390 U.S. 747, 796 (1968) (FPC's rate-setting power included authority to require a rate structure for natural gas under which prices "were computed according to the method by which gas is produced"). And before the adoption of Section 332(c)(3)(A), States had regulated wireless telephone rates by, among other things, exercising oversight over the carriers' rate structures. See, *e.g.*, *Connecticut Dep't of Pub. Util. Control*, 78 F.3d at 847 (Connecticut reviews whether cellular carriers' "rate structures were unreasonable or discriminatory"); *Hawaii Pub. Util. Comm'n*, 10 F.C.C.R. at 7879 ¶ 32 (Hawaii "monitor[s] rate design and structure" of wireless carriers); *Nationwide Cellular Serv., Inc.* v.

66a. See *Nader* v. *FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) ("[W]ithin the power to prescribe charges is the power to determine and prescribe those elements that make up the charge."). Since a line item in a wireless bill causes a carrier to disaggregate or unbundle a component of service and associate a charge with it, regulation of line items directly implicates the carrier's rate structure. Thus, the Commission reasonably determined that state requirements and prohibitions on the use of line items constitute regulation of rate structures and are a form of rate regulation proscribed by Section 332(c)(3)(A). Pet App. 66a-69a. The court of appeals' contrary reading, even if it would also constitute a permissible interpretation of the statute, cannot foreclose the Commission's own reasonable construction. *Brand X*, 545 U.S. at 980; *Chevron*, 467 U.S. at 843-844.

Even looked at in isolation, the dictionary definitions of "rates" relied upon by the court of appeals do not show that the Commission's interpretation of Section 332(c)(3)(A) is unreasonable. A line item, as defined by the Commission, is a "discrete charge identified separately on an end user's bill." Pet. App. 65a. It is a com-

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Public Serv. Comm'n, 583 N.Y.S.2d 852, 853 (App. Div. 1992) (New York regulates the "rate structures" of intrastate cellular service).

The Commission's construction also is consistent with agency precedent construing the scope of preempted rate regulation in Section 332(c)(3)(A) to include "both rate levels and rate structures" for cellular telephone service. *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898, 19,907 ¶ 20 (1999). The Commission has stated that "states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements * * * or specify which among the [cellular] services provided can be subject to charges" by providers. *Ibid.*; see *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,025 ¶ 8; *Cellco P'ship* v. *Hatch*, 431 F.3d 1077, 1080 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006).

ponent of the price that a customer must pay to receive cellular telephone service, and as such is one of the building blocks for the "amount paid or charged" for that service. *Id.* at 25a (quoting *Black's Law Dictionary* 1268 (7th ed. 1999)). Thus, a line item is an integral part of the rate for cellular service even under the dictionary definitions cited in the court's decision. State requirements or prohibitions with respect to those rate elements constitute rate regulation that is preempted by Section 332(c)(3)(A) even under the court of appeals' reading of that provision.

The court of appeals stated that the Commission's interpretation was contrary to the language of the statute because the prohibition or requirement of a line item "affects the *presentation* of the charge on the user's bill, but it does not affect the *amount* that a user is charged for service." Pet. App. 26a (emphasis added). That statement overlooks the Commission's finding that "line item regulation would affect a * * * carrier's rates and rate structure." *Id.* at 69a. The effect on the rate structure would come about, the Commission explained, because a "carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction." *Ibid.*

Moreover, because wireless carriers "generally have come to structure their offerings on a national or regional basis," Pet. App. 75a, the Commission found that state-specific line-item regulation "would affect" the dollar amounts that individual customers pay for service, *id.* at 69a. As the Commission had explained in an earlier order, which it cited in the order at issue here, "all of the nationwide operators offer some version of a

national rate pricing plan in which customers can purchase a bucket of [minutes] to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges." *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 19 F.C.C.R. 20,597, 20,644 ¶ 113 (2004); see Pet. App. 75a n.104. When a State prohibits a carrier with such a rate structure from using a separate line item to pass through the cost of a state tax to its customers in that State, the carrier that wishes to maintain a consistent national or regional price system can recover the cost only by increasing its base service charges to *all* of its customers, regardless of where they are located.[6] As a result, customers in other States will bear the costs of the state tax through their payment of higher base charges. Alternatively, a carrier could abandon national pricing and adjust its rates in each State based on that jurisdiction's taxes and fees. Either way, state regulation of line items would affect the amount a carrier charges. The court's assertion that a prohibition on line items "does not affect the amount that a user is charged" simply ignores the Commission's findings on that point. *Id.* at 26a.

3. The court of appeals faulted the Commission for failing to reconcile its determination that a state re-

[6] Although a carrier could theoretically decide not to pass on the costs of the state tax to any of its customers, the record before the Commission shows that it is highly unlikely that a carrier would elect such an option. See Comments of Verizon Wireless 11-12 (July 14, 2004); Comments of CTIA—The Wireless Association 5 (July 14, 2004); Comments of Leap Wireless International, Inc. 9 (July 14, 2004). Thus, unless the carrier completely retooled its pricing structure and established a separate base price for citizens in the taxing State that passed through the state tax, the burdens of that tax in all likelihood would be exported to citizens of other States.

quirement or prohibition on line items is proscribed by Section 332(c)(3)(A) with its prior determination that a State may require cellular providers to contribute to the state universal service fund. Pet. App. 29a (citing *Pittencrieff*, 13 F.C.C.R. at 1735). In fact, no inconsistency exists.

First, as the Commission pointed out, Section 254(f) of the Communications Act, 47 U.S.C. 254(f), expressly authorizes States to require cellular providers to contribute to state universal service support mechanisms. Pet. App. 70a. In interpreting Section 332(c)(3)(A) not to preempt States from requiring cellular providers from contributing to universal service funds, the Commission reasonably interpreted Section 332(c)(3)(A) in a manner that gives effect to the statutory policy underlying Section 254(f). See *Pittencrieff*, 13 F.C.C.R. at 1737 ¶ 4.

Second, the requirement that a carrier contribute to a state universal service fund is an obligation that the State imposes upon the carrier, not a regulation governing the rates that the carrier charges its customers. Whereas state requirements or prohibitions on line items directly regulate rates by dictating the rate structure for wireless service, Pet. App. 66a-69a, a requirement that a carrier contribute to a universal service fund—like the imposition of any other valid state tax or fee—does not have the same "direct effect on the * * * carrier's rates and rate structure," *id.* at 73a. The Commission could therefore reasonably distinguish between the two types of requirements. Ultimately, drawing the fine distinctions necessary in this area "involves difficult policy choices" that are committed to the Commission. *Brand X*, 545 U.S. at 980.

Finally, the court of appeals suggested that the Commission's interpretation of Section 332(c)(3)(A) would render that provision's carve-out for "other terms and conditions" superfluous because it would permit the preemption of "virtually any form of state regulation of wireless service, including laws regarding disclosure and consumer protection." Pet. App. 32a. That concern is without foundation. The Commission held that Section 332(c)(3)(A) preempts state regulations that mandate or prohibit the use of line items because such regulations have "a direct effect on the [cellular] carrier's rates and rate structures." *Id.* at 73a. Thus, the Commission's ruling does not speak to state regulations that have no effect, or only an indirect effect, on cellular telephone rates.

Moreover, although the court of appeals stated that the Commission's ruling would permit the preemption of state disclosure and consumer protection laws, Pet. App. 32a, the Commission made clear that "state regulations that address * * * disclosure * * * and the neutral application of state contractual or consumer fraud laws, are *not* preempted by section 332." *Id.* at 72a (emphasis added). The court of appeals similarly asserted that "state taxes[] would be preempted" by the Commission's construction of Section 332(c)(3)(A), *id.* at 32a, even though the Commission itself construed Section 332(c)(3)(A) *not* "to limit a state's authority to impose taxes or other regulatory fees," *id.* at 71a. The Commission's ruling was "limited to state regulations that require or prohibit the use of line items." *Id.* at 75a. In finding error in the Commission's construction of Section 332(c)(3)(A), the court of appeals invoked a parade of horribles that the Commission had expressly disavowed.

B. Review Is Not Warranted At This Time

Despite the deficiencies in the decision below, review by this Court is not warranted at this time. The decision does not conflict with any decision of any other court of appeals. More importantly, in addition to ruling on the preemptive effect of Section 332(c)(3)(A), the Commission observed that state regulations prohibiting or mandating line items "may be subject to preemption because they conflict with established federal policies." Pet. App. 74a. The Commission pointed out that state line-item requirements and prohibitions might be "inconsistent with the federal policy of a uniform, national, and deregulatory framework" for cellular telephone service, in which rates are established by the carrier and its customers in service contracts, "rather than dictated by federal or state regulators." *Id.* at 74a-75a. Because the court of appeals remanded the case to the Commission, *id.* at 37a, the agency on remand will have an opportunity to decide whether to bar state line-item regulations on the basis of conflict preemption.

That means of preemption is entirely distinct from that governed by Section 332(c)(3)(A), and it therefore remains an option that is available to the Commission, even under the decision of the court of appeals. See *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law."); see also Br. in Opp. 24 (noting that "the FCC distinguished the express preemption it found from any implied preemption that it believed—but did not conclude—might also apply"); Pet. Reply 4 ("[W]e

agree with the respondents * * * that the FCC did not exercise *de la Cuesta* authority in this case.").

More broadly, the Commission in the pending rulemaking is considering whether it should invoke conflict preemption to prohibit state regulation of wireless billing practices, a category that includes line-item regulations. Pet. App. 88a-94a. In that rulemaking, the Commission is also evaluating whether Sections 205(a) and 201(b) of the Communications Act expressly authorize the agency to preempt state regulations that prescribe billing format and content, including line-item charges. *Id.* at 90a; see p. 8 & note 3, *supra*. As part of those inquiries, the Commission is considering whether the obligation of wireless carriers to satisfy the disparate billing regulations of 50 different States impedes competition and impermissibly burdens interstate commerce. Pet. App. 89a. The Commission has not decided whether it can preempt state regulation of line items or other state billing practices on the basis of any of the theories described above, and if so, whether it should exercise such authority. But the matter remains pending.

The court of appeals held only that the agency erroneously interpreted Section 332(c)(3) to prohibit States from requiring or prohibiting line items on cellular telephone bills. The court's interpretation of that one provision of the Communications Act does not foreclose the Commission from deciding on remand or in the pending rulemaking whether to preempt state line-item regulations based on other provisions in the statute, or based on a conflict between those regulations and the Communications Act as a whole. See generally *City of New York* v. *FCC*, 486 U.S. 57 (1988); *De la Cuesta*, 458 U.S.

at 154.[7] If the Commission decides to preempt such regulations, either on remand or in a future rulemaking order, then this Court's review of the preemptive scope of Section 332(c)(3)(A) may be unnecessary. Moreover, even if the case returned here after such an administrative decision, the Court could consider both the scope of Section 332(c)(3)(A) and the alternative basis for preemption in the same case. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). In light of the clear possibility that the Commission could reach the same result using alternative grounds, the interlocutory nature of this case makes this Court's review premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

[7] The court of appeals stated in dicta that Section 332(c)(3)(A) "preserved" state authority to regulate line items in wireless bills, Pet. App. 25a, but it did not purport to resolve whether the Commission could use conflict preemption as a basis for barring States from requiring or prohibiting line items. While the Commission made tentative findings and observations concerning conflict preemption, *id.* at 74a, 89a-90a, it based its decision solely on the preemptive effect of Section 332(c)(3)(A), *id.* at 65a-76a. The court of appeals vacated only "the preemption ruling set forth in the Declaratory Ruling," *id.* at 37a, that is, the FCC's determination that "the express language of section 332(c)(3)(A)" preempts state regulation requiring or prohibiting line items, *id.* at 33a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-1184

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In The

Supreme Court of the United States

SPRINT NEXTEL CORPORATION AND
T-MOBILE USA, INC.
Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ADMINISTRATIVE MATERIALS

In re Petition for Declaratory Ruling Filed By CTIA Regarding Whether Early Termination Fees are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A), FCC WT Docket No. 05-194 6

The issue in this case is whether the Federal Communications Commission ("FCC" or "the Commission") properly interpreted section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), to preempt state regulations prohibiting wireless carriers from collecting state taxes and fees by using line items. Wireless carriers use line items so that they may offer rate plans – such as 600 minutes for $40 per month – nationwide, and collect taxes and fees only from residents of the jurisdiction imposing the tax or fee. State and local governments prohibit the use of line items because, by doing so, they effectively hide the existence of the tax, which typically is rolled into a monthly rate if it cannot be listed separately. In addition, high tax jurisdictions may effectively export the tax by prohibiting line items because carriers are likely to respond to such prohibitions by increasing their rates nationwide rather than adopting different rate plans for different jurisdictions.

In response to this Court's invitation, the Solicitor General has explained in detail why the Eleventh Circuit erred by overturning the FCC's conclusion that state regulation of line items is preempted. The Solicitor General nevertheless recommends against further review at this time because the FCC might decide to preempt state regulations prohibiting the use of line items under a distinct theory. Rather than waiting for an opportunity to address a different issue, the Court should grant review now in order to clear up significant confusion in the lower courts concerning the role of the presumption against

preemption in cases involving agency decisions entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

I. This Case Presents An Opportunity To Address The Important And Recurring Issue Whether The Presumption Against Preemption Affects Review Of Agency Decisions Entitled To *Chevron* Deference.

The Solicitor General rightly stated (SG Br. 11) that the Eleventh Circuit "erred by not according appropriate deference to the FCC's reasonable construction of Section 332(c)(3)(A)." The statutory construction issue presented is whether line items – "discrete charge[s] identified separately on an end user's bill" (Pet. App. 65a) – are "rates charged" within the meaning of the statute. The FCC correctly concluded that the phrase is ambiguous, but determined that "rates charged" is best interpreted to include separate charges on wireless bills. As the Solicitor General explained, that interpretation is not mandated by Congress's use of the phrase "rates charged," but is entirely consistent with the extensive history involving regulation of the "rate structures" established by wireless carriers and other regulated entities. SG Br. 13-14.

The Solicitor General also correctly concluded (Br. 12) that the court of appeals' invocation of the presumption against preemption "does not justify the court's failure to defer." In *Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735, 744 (1996), this Court gave

Chevron deference to an agency interpretation that extended a statute's preemptive effect without regard to the presumption against preemption. As the Solicitor General explained (SG Br. 12), that approach is sensible where – as in this case and *Smiley* – there is no question that Congress intended the statute at issue to have preemptive effect and gave a federal agency authority to interpret the statute.

This case therefore presents an important and recurring issue involving federal-state relations: what role, if any, does the presumption against preemption play in cases where an agency's interpretation of a statute with preemptive effect is subject to *Chevron*. The parties briefed that issue last Term in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 & n.13 (2007), but the Court did not address it because it concluded that the National Bank Act itself – without regard to the interpretation provided by the Office of the Comptroller of the Currency – preempted the state regulation at issue. The dissenters disagreed with the Court's conclusion that the statute was clear, and would have held that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." *Id.* at 1584.

As *Watters* illustrates, the question presented here is a recurring issue that arises under a wide array of statutes administered by federal agencies. The issue is squarely presented here because, notwithstanding the Eleventh Circuit's conclusion

that the statute is unambiguous (Pet. App. 25a), it is not. As the D.C. Circuit correctly explained, section 332(c)(3)(A) "leaves its key terms undefined" and "never states what constitutes rate or entry regulation." *Cellular Telecomms. Industry Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999). This case therefore presents an opportunity for the Court to address the narrow but important issue that it did not reach in *Watters*.

II. The Court Should Not Decline The Opportunity To Clarify The Relationship Between The Presumption Against Preemption And *Chevron* Because The FCC Might Preempt State Regulation Of Line Items Using A Distinct Theory.

The Solicitor General recommends against review at this time because the FCC might someday reach the same result – preempting state rules prohibiting the use of line items – by employing conflict preemption principles. As the Solicitor General states, under *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982), and *City of New York v. FCC*, 486 U.S. 57 (1988), federal agencies acting within the scope of their authority may preempt state laws notwithstanding the absence of any statement by Congress that preemption is warranted. Rather, a federal agency may preempt based on its conclusion that a state or local regulation frustrates the achievement of an important federal goal.

As an initial matter, there is little doubt that the Eleventh Circuit would reverse if the FCC employed its conflict preemption authority in that manner. The court held that Congress "unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." Pet. App. 25a. As we explained (Pet. 20-21), that holding is based on a misreading of Congress's use of the phrase "other terms and conditions" in section 332(c)(3)(A). Notwithstanding the Solicitor General's dismissal of the court of appeals' statement that Congress preserved state authority as "dicta" (SG Br. 21 n.7), it seems likely that a panel of the Eleventh Circuit would conclude that its statement that Congress "unambiguously preserved the ability of the States to regulate the use of line items" (Pet. App. 25a) precluded the FCC from preempting state regulation of line items. Moreover, although conflict preemption is indeed distinct from express preemption of the sort at issue here, the Eleventh Circuit is likely to perceive preemption by a federal agency on the ground that it believes state law is frustrating the achievement of a federal goal as being more troubling than preemption based on interpretation of a federal statute that Congress plainly intended to have preemptive effect. And as we explained (Pet. 21), respondents would be able to seek review in that court – the FCC will not have the opportunity to test an alternative preemption theory in a court not bound by the decision in this case.

In the meantime, the FCC and other courts will unnecessarily address issues that would be resolved

by a decision by this Court upholding the FCC's interpretation of section 332(c)(3)(A). As we noted, the FCC explicitly preempted regulations in Vermont, Indiana, and Georgia (Pet. App. 68a-69a n.87), and issues involving state prohibitions on line items subsequently have arisen in Washington, Kentucky, and Texas (Pet. Reply 8-10). But because none of those cases arises on direct review of the FCC's preemption decision, it is not clear what weight the courts will or should give the agency's interpretation of the statute, which the Eleventh Circuit vacated in this case. Accordingly, those cases will not necessarily provide an opportunity for the Court to address the narrow, but recurring and important, issue presented here.

In addition, class action lawsuits are pending around the country involving the legality under state law of early termination fees – fees assessed by wireless carriers when subscribers cancel before the end of the one- or two-year term common to wireless contracts. In 2005, a state court in South Carolina asked the FCC to determine whether early termination fees are "rates charged" within the meaning of section 332(c)(3)(A), and the FCC opened a general proceeding to address that issue. *In re Petition for Declaratory Ruling Filed By CTIA Regarding Whether Early Termination Fees are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A)*, FCC WT Docket No. 05-194. But the FCC has not resolved the issue, in large part due to the Eleventh Circuit's invalidation of its interpretation of "rates charged" in this case. Some

state courts have grown tired of waiting for the FCC to decide the early termination fee issue, including an Alameda County, California, class action involving thousands of plaintiffs, where the court has scheduled the case for trial in March 2008. *In re Cellphone Termination Fee Cases*, No. J.C.C.P. 4332 (Cal. Super. Ct. Nov. 30, 2007). The issue presented here – involving the meaning of "rates charged" – is likely to affect the resolution of the early termination fee controversy, and is much more likely to do so than would a decision involving the FCC's exercise of its authority to preempt using conflict preemption principles.

* * * * *

This case presents an important and recurring issue involving state and federal relations – an issue this Court was asked to address, but did not reach, last Term in *Watters*. This Court should not wait for an opportunity to address a distinct preemption issue that does not involve the relationship between the presumption against preemption and *Chevron*. Instead, the Court should provide clarity to federal agencies and the lower courts by deciding the question presented by this case – which is simultaneously narrow, yet important and recurring.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

I. THE UNITED STATES CORRECTLY CONCEDES THAT REVIEW OF THE ELEVENTH CIRCUIT'S DECISION IS UNWARRANTED.

The United States is correct on several essential points addressed in its brief: *First*, the petition for a writ of certiorari **should be denied**. SG Br at 22; Br. in Opp. at 1-2, 11. As Respondents previously noted, the Court grants certiorari "only for compelling reasons," and such reasons are not presented by the Petitioners. Br. in Opp. at 11, *quoting* Sup. Ct. R.

10. *Second*, the Eleventh Circuit's decision does not directly conflict with any decision of this Court or any other circuit court of appeals and no grounds for review are presented on this basis. SG Br. at 19; Br. in Opp. at 12, 22-27. *Third*, the United States concedes that there are no issues of overriding national concern that the Court should settle at this time. *Finally*, while the United States and the Respondents obviously disagree over the correctness of the Eleventh Circuit's decision, the United States tacitly concedes that error below, whatever it might be, does not warrant review by the Court. Br. in Opp. at 11.

In short, both the United States and Respondents agree that none of the criteria for discretionary review are met in this case. Petitioners have not shown to the contrary.

II. PETITIONERS' RELIANCE ON SELECTED ELEMENTS OF THE UNITED STATES' BRIEF PROVIDES NO BASIS FOR REVIEW.

Couched as a response to the Solicitor's arguments, Petitioners resurrect a two-part argument to support certiorari: First, Petitioners again claim that this case "presents an important and recurring issue involving . . . what role, if any, does the presumption against preemption play in cases where an agency's interpretation of a statute with preemptive effect is subject to *Chevron*." Pet. Supp. Br. at 3. Second, Petitioners assert that the Court should review despite the fact that on remand the FCC may attempt to preempt State regulation of carrier line item charges based on theories other than express preemption. *Id.* at 4. In presenting their arguments, Petitioners raise a number of peripheral or irrelevant

issues. In the end, however, none of the Petitioners' contentions have merit.

A. The Eleventh Circuit Correctly Held That State Laws Controlling The Presentation Of Line Item Charges On Wireless Carriers' Bills Are Not Preempted By 47 U.S.C. § 332(c)(3)(A)

Although the United States believes that the court of appeals "ignored" (SG Br. at 16), or "overlooked" (*id.* at 10), elements of the FCC's declaratory ruling, an examination of the court's decision below demonstrates that the Eleventh Circuit quite properly utilized standards of statutory construction and agency review to unanimously vacate the FCC's faulty analysis. Pet. App. 1a-33a, 36a-37a. The Eleventh Circuit carefully followed a detailed analytical framework for its review of 47 U.S.C. § 332(c)(3)(A) and the FCC's Declaratory Ruling consistent with the two-step process established by this Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Pet. App. 12a. The Eleventh Circuit's decision ensures that Congress' express reservation of State authority over "other terms and conditions" of wireless service continues to have meaning.

Although it recognized that the term "rates charged" is not defined in the Act, the Eleventh Circuit reasonably concluded that "the meaning of this term is clear in this context" and that "a straightforward reading of the complementary phrases 'regulate entry of or rates charged' and 'other terms and conditions' . . . evidences the 'clear and manifest purpose of Congress' to leave the regulation of line items to the states. . . ." Pet. App. 25a. Significantly, the court recognized that accepting the

FCC's rationale would confer virtually unlimited discretion on the agency to preempt virtually any State oversight of wireless carriers' "other terms and conditions" of service. This reading, the Eleventh Circuit concluded, cannot be squared with the express Congressional intent that States retain significant authority over "other terms and conditions of" wireless service, consistent with the broad authority they exercised over such service prior to the 1993 amendments to 47 U.S.C. § 332(c)(3)(A). The Eleventh Circuit specifically found that the FCC "failed adequately to explain its conclusion that a line item falls within the definition of 'rates' because the use of line items has an alleged direct effect on rates." Pet. App. 28a. The United States ignores this aspect of the court's decision, which recognized—correctly—that the FCC's analysis would vastly expand its authority because **any State regulation can be said to affect wireless carriers' rates.**

The United States further claims that the appeals court "invoke[s] a parade of horribles that the Commission had expressly disavowed." SG Br. at 18. But nowhere does the United States explain why the FCC's overbroad rationale, if upheld on review, would not necessarily permit the FCC to preempt "even powers historically retained by the states, such as the imposition of state taxes . . . so long as they impact 'how carriers recover [the] costs of doing business.'" Pet. App. 32a, *quoting TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). As the Eleventh Circuit correctly noted, the FCC's overbroad interpretation of 47 U.S.C. § 332(c)(3)(A) in favor of its own authority over wireless "rates" necessarily would allow the agency "indefinitely to expand its authority without regard to the mandate by Congress that 'other terms and conditions' remain the realm of state regulation."

Id. The FCC's interpretation of its authority on its face, confounds Congress' express intent and is thus a clear violation of a "cardinal principle of statutory construction. . . ." *Id.*

Both Petitioners and the United States overstate the impact of the Eleventh Circuit's decision by embellishing the possible harm from States having the authority to require or prohibit inclusion of line items on wireless bills, specifically citing to local taxes and Universal Service Fund payments as examples. SG Br. at 7-8; Pet. Supp. Br. at 1-4; *but see* Br. in Opp. at 13 *et seq.* (rebutting claims of hidden taxes and USF payments). Further, Petitioners renew their unsubstantiated claims that the Eleventh Circuit's decision will encourage state governments to hide taxes on wireless service by preventing wireless carriers from being able to bundle and offer national rate plans. Pet. Supp. Br. at 1. As the Respondents earlier argued, the breadth of the FCC's ruling preempting any State laws requiring or prohibiting line items, including State or local taxes or regulatory fees, carries the effect of the FCC ruling far beyond the scope of the initial scope of the inquiry.

B. *Watters* Does Not Reach The Question Whether Preemptive Agency Rules Should Receive *Chevron* Deference.

Petitioners resurrect their claims that the Court's ruling in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) warrants granting certiorari. Pet. Supp. Br. at 3-4, 7. The United States, by omitting any reference to *Watters* in its brief—despite Petitioners' express reliance on it in support of review (Pet. Reply Br. at 3-4, 7), implicitly rejects Petitioners' claims.

Watters expressly does not reach the question of whether agency regulations preempting State law should receive *Chevron* deference. Petitioners simply disregard the Court's explicit ruling that "under our interpretation of the statute, the level of deference owed to the regulation is an academic question." *Watters*, at 1572. The Eleventh Circuit's decision in no way conflicts with the Court's decision in *Watters*.

The *Watters* decision and the case below address different types of preemption. Contrary to Petitioners' suggestion, *see* Pet. Supp. Br. at 3, the Sixth Circuit decision affirmed by *Watters* did not indicate that the presumption against preemption is always inapplicable to agency actions. *See* SG Br. at 19-21, discussing preemption in context of pending FCC rulemaking. Indeed, the Sixth Circuit noted that the State "correctly asserted that there is a presumption against preemption in areas of regulation typically left to the states" but concluded the presumption did not apply to "'conflict preemption' . . . where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Watters v. Wachovia Bank, N.A.*, 431 F.3d 556, 560 & n.3 (6th Cir. 1982), *citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153-54 (1982). Of course, here Congress has expressed its purpose and objective to **preserve** State regulation of "other terms and conditions"—as opposed to "rates" and "entry"—for wireless service.

C. Petitioners' Other Arguments Fail To Provide Any Additional Basis For Review.

The United States argued the Court need not review the Eleventh Circuit's decision because "the agency on remand will have an opportunity to decide

whether to bar state line-item regulation on the basis of conflict preemption. . . ." which is "entirely distinct from that governed by Section 332(c)(3)(A). . . ." SG Brief at 19. In response, Petitioners assert that the Eleventh Circuit would likely reverse such a holding. Pet. Supp. Br. at 4. Petitioners thereby implicitly concede the Solicitor General's point. It is not certain what the FCC will do on remand or in the pending rulemaking or how the Eleventh Circuit or another appeals court will address the eventual FCC decisions or their rationale. The only thing certain is that any subsequent FCC's actions will be appealable.

Petitioners also raise the issue of the FCC's "failure," to date, to decide whether wireless carriers' early termination fees are "rates charged" under 47 U.S.C. § 332(c)(3)(A) and so preempt any State regulation. Pet. Supp. Br. at 6. Petitioners even suggest that the unsettled status of the Eleventh Circuit's decision is the cause of such "delay." *Id.* Petitioners' claims are entirely unsubstantiated. In any event, Petitioners' suggestion that this Court's review of the Eleventh Circuit's decision could resolve the pending FCC proceedings regarding early termination fees, is effectively a request for the Court to issue an advisory opinion since, by definition, there is no case or controversy arising from FCC inaction.

CONCLUSION

The United States chose not to petition the Court for review of the Eleventh Circuit's decision, chose not to support Petitioners' request for review, and affirmatively waived any right to file a brief in support of Petitioners' request. The United States' inaction strongly suggested it did not believe review

was warranted. Now, in response to the Court's invitation and even **after a second, more exhaustive examination of the petition and the decision below**, the United States has again concluded that this case does not warrant review. Petitioners have failed on all counts to make the case for review, and for the reasons set forth in the briefs filed by Respondents and the United States, the petition for review should be denied.

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The opposition filed by the National Association of State Utility Consumer Advocates ("NASUCA") and the National Association of Regulatory Utility Commissioners ("NARUC") does not seriously dispute that this case presents two recurring issues involving federal-state relations. Nor does the opposition rebut our showing that this case will have an important impact on the more than 220 million Americans who subscribe to wireless service and the wireless carriers that serve them. Indeed, the presence of those two national regulatory organizations in this case shows that they consider the questions presented to be of the utmost importance.

ARGUMENT

I. This Court Should Determine Whether The Eleventh Circuit Erred By Relying On The Presumption Against Preemption To Guide Its Application Of *Chevron*.

The first question presented involves the relationship between the presumption against preemption and review of agency decisions under the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Eleventh Circuit invoked the presumption against preemption in this case, stating that it "guides our understanding of the statutory language." Pet. App. 23a. The court of appeals then held that 47 U.S.C. § 332(c)(3)(A) – which preempts state and local governments from regulating the "the entry of or the rates charged" by wireless carriers, but does not preempt regulation of "other terms and conditions" of wireless service – unambiguously preserves state regulation of line items on wireless bills. A court that did not invoke the presumption against preemption would not have reached that conclusion, but would have upheld the reasonable interpretation of section 332(c)(3)(A) provided by the Federal Communications Commission ("FCC" or "Commission").

Review of this issue is warranted because the Eleventh Circuit's decision conflicts with this Court's decision in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which held that the presumption against preemption does not trump *Chevron*. In addition, although this Court recently considered the relationship between the presumption against preemption and *Chevron* in *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (Apr. 17, 2007), it did not provide the guidance needed by the lower courts because it concluded that the relevant statutory language was dispositive.

NASUCA and NARUC argue that the decision below is not inconsistent with *Smiley*. *See* Opp. 25-27. At issue in *Smiley* was a decision by the Comptroller of the Currency that the statutory term "interest" includes "late fees." *Smiley*, 517 U.S. at 737. Under the statute at issue, the broader the definition of "interest," the broader the scope of preemption – just as in this case, the broader the meaning of "rates charged," the broader the scope of preemption. The Court concluded that the Comptroller's interpretation was entitled to *Chevron* deference. The Court assumed without deciding that *whether* a statutory provision is preemptive might be "decided *de novo* by the courts," but held that when the issue "is simply the meaning of a provision," *Chevron* applies. *Id.* at 745.

NASUCA and NARUC appear to recognize that, under *Smiley*, an agency interpretation of a term like "interest" is entitled to deference without regard to the presumption against preemption. They therefore contend that "[t]he FCC's ruling cannot be equated with a regulation defining a substantive term of the Act." Opp. 27. But that is exactly what the FCC's ruling was. The FCC defined "rates charged" to include charges listed in line items on customers' bills. Contrary to NASUCA and NARUC, the FCC did not address "whether the relevant statute is preemptive." *Id.*

There simply is no dispute that state and local governments are preempted from regulating the rates charged by wireless carriers – the only dispute here is whether charges in line items are "rates charged" within the meaning of the statute. Accordingly, there is no merit to respondents' attempt to distinguish this case from *Smiley*.

Review of the decision below will provide this Court with the opportunity to provide further guidance on the relationship between the presumption against preemption and *Chevron* – guidance that is needed because the court below thought that it could apply *Chevron* with a thumb on the scale. The relationship between the presumption and *Chevron* was at issue, but not resolved, in *Watters*. In that case the Comptroller concluded that states were preempted from regulating the mortgage lending activities of subsidiaries of national banks. The court of appeals reviewed the Comptroller's determination "through the framework established by *Chevron*" without any adjustment on account of the presumption against preemption and upheld his decision. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 (6th Cir. 2005).

In her brief to this Court, the Michigan regulator argued that agency regulations that preempt state laws are not entitled to deference under *Chevron*. Brief for the Petitioner at 31-35, *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (Apr. 17, 2007). This Court held that the deference issue presented "an academic question" because the regulation at issue "merely clarifies and confirms" what the statute provides. *Watters*, slip op. at 16. The dissenters disagreed and would have held that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." *Id.* at 20-21 (Stevens, J., dissenting).

Watters shows that issues involving the relationship between *Chevron* and the presumption against preemption are recurring issues involving the broad range of matters regulated by federal agencies. The dissenters' statement that "something less than *Chevron* deference" is warranted, while similar to the Eleventh Circuit's decision that the presumption should "guide[]" its analysis, appears to have been based on the dissenters' view that the Comptroller was not merely interpreting the National Bank Act, but was exercising the authority to preempt recognized in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). *See Watters*, slip op. at 11-12 (Stevens, J., dissenting). One point on which we agree with the respondents is that the FCC did not exercise *de la Cuesta* authority in this case. *See* Opp. 24 & n.16. To the contrary, like *Smiley* this is a case involving preemption resulting from the construction of a statutory term. In any event, *Watters* did not clarify the relationship between the presumption against preemption and review under *Chevron*. It may have raised the question whether there is a relevant difference between cases like *Smiley*, which involve construction of a statutory term, and cases in which an agency exercises its authority under *de la Cuesta*.

This case presents an opportunity to provide guidance on the relationship between the presumption against preemption and *Chevron* because, contrary to the Eleventh Circuit's holding in this case, section 332(c)(3)(A) is ambiguous. As the D.C. Circuit stated in *Cellular Telecommunications Industry Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999), "Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless service." Because Congress did not determine whether line item charges are "rates," this Court will have the opportunity

to address the relationship between the presumption against preemption and *Chevron* in this case. Although NASUCA and NARUC argue to the contrary, it is simply not plausible to conclude that the FCC erred in its construction of "rates charged" unless a reviewing court is strongly influenced by the presumption against preemption.[1]

Furthermore, as explained in our petition, even though litigation continues in the lower courts concerning the legality of line item bans, this case, arising on direct review of the FCC's decision, is the only case where it is clear that the agency's interpretation would be fully entitled to deference but for the presumption against preemption. Pet. 17. Other cases necessarily will raise the issue whether an agency interpretation is entitled to deference when the decision providing its interpretation has been vacated, meaning that those cases may not present an opportunity to address the relationship between the presumption against preemption and *Chevron*.[2]

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[1] On the merits, respondents first claim that a "rate" is a "'charge or payment' for a particular good or service." Opp. 21. But "'a line item is one of the charges a wireless customer pays in order to receive service.'" Pet. 12, *quoting Peck v. Cingular Wireless, LLC*, No. C06-343Z (W.D. Wash. Oct. 24, 2006) (Pet. App. 145a). Second, respondents claim that the FCC's construction of section 332(c)(3)(A) drains "other terms and conditions" of meaning and would permit preemption of state laws imposing taxes. But nothing in the FCC's order preempts state and local laws that merely affect the presentation of charges on bills. *See* Pet. 13-15. In addition, the FCC made clear that it was not preempting state and local taxes, but only rules prohibiting wireless carriers from recovering those taxes by means of line items. Pet. App. 70a.

[2] Respondents half-heartedly suggest that the FCC's decision is not entitled to deference because it "was adopted without any

II. Review Is Warranted Because The Eleventh Circuit's Decision Harms Consumers And Permits Unnecessary Regulation Of Wireless Carriers.

The second question presented is whether the Eleventh Circuit erred by holding that section 332(c)(3)(A) unambiguously preserves state laws banning line items. In our petition we showed that the Eleventh Circuit's decision permits state and local governments to hide taxes in wireless bills and undermines Congress's goal of deregulating wireless services as competition develops. Pet. 16-21. NASUCA and NARUC do not dispute that the decision permits states and localities to hide taxes, but instead contend that our "angst over 'hidden' State or local taxes is overblown." Opp. 15. In addition, they make the remarkable claim that Congress did not intend "to introduce a deregulatory scheme governing wireless service." *Id.* at 17.

On the latter point, it bears emphasis that Congress plainly eliminated state and local rate and entry regulation, the two primary forms of utility regulation. Moreover,

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prior notice." Opp. 26 n.17. There is no merit to that claim. The FCC's preemption decision was made by the full Commission in a declaratory ruling issued after the Commission received hundreds of comments, including an 18-page letter on preemption from Nextel and T-Mobile. Letter, FCC CG Docket No. 04-208 (Dec. 13, 2004). NASUCA held numerous meetings at the FCC where it "reiterated its opposition to wireless carriers' arguments that the Commission ought to preempt state laws governing their billing practices and descriptions." Ex Parte Presentation, FCC CG Docket No. 04-208, at 2 (Feb. 14, 2005). NARUC adopted a resolution stating that the FCC "should not preempt States from establishing more stringent standards for consumer protection" and presented it to the FCC. Ex Parte Presentation, FCC CG Docket No. 04-208, at 4 (March 2, 2005). Respondents had ample notice.

respondents ignore section 332(c)(1)(C), which instructed the FCC to issue an annual competition report and reduce regulation of wireless services as competition developed. Congress expanded and strengthened that provision to include all telecommunications carriers in 1996 by adding 47 U.S.C. § 160, which mandates forbearance from regulation when competition will protect consumers. As we showed in our petition, the wireless industry is much more competitive now than it was in 1993 and regulation therefore should be decreasing. *See* Pet. 19.

We also pointed out in our petition that the FCC tentatively concluded in the Order on review that it has authority to adopt regulations governing the "terms and conditions" of wireless service and then decide that further regulation is unwarranted. Pet. 18-21. NASUCA does not dispute our claim (Pet. 21) that it will challenge any regulations the FCC adopts that have a preemptive component in the Eleventh Circuit because, having erroneously concluded that Congress broadly preserved state and local regulation of "other terms and conditions" of wireless service, that court is likely to be receptive to arguments that the FCC exceeded its authority. Therefore, the court's erroneous decision in this case is likely to affect other FCC decisions – and there is no prospect for a conflict in the circuits to develop if, as it may, NASUCA challenges preemption orders in the Eleventh Circuit.

Nor is there merit to respondents' claims that there is no reason for this Court to be concerned that the Eleventh Circuit's decision authorizes state and local governments to hide taxes in wireless bills. As an initial matter, the typical wireless customer pays 17% in state and local taxes, more than twice the average amount imposed on other goods and services. *See* http://www.mywireless.org/issuestaxes/. As respondents note, Texas recently added a new tax and

ordered wireless carriers not to collect it by means of line items. Opp. 15 n.10. If the decision below stands, more state and local governments undoubtedly will avail themselves of the opportunity to impose taxes that cannot be identified.

In a decision released on the day the petition for a writ of certiorari was filed, *AT&T Corp. v. Rudolph*, 2007 U.S. Dist. LEXIS 13962 (E.D. Ky. Feb 27, 2007), a district court invalidated a newly enacted Kentucky law barring telecommunications carriers from recovering a state gross receipts tax by means of line items.[3] The court first rejected AT&T's Commerce Clause challenge. The court acknowledged that a carrier might respond to the ban by raising its rates generally, including its rates on out-of-state customers, but noted that Kentucky permitted carriers to recover the gross receipts tax "by rolling it into the rates of only their Kentucky customers." *Id.* at *31. Accordingly, because a carrier might choose *not* to export the tax to customers outside Kentucky, but instead to raise its rates in Kentucky only, the court concluded that the line item ban did not violate the Commerce Clause.

The Kentucky district court then invalidated the line item ban on First Amendment grounds. It agreed that line items "'provide carriers a timely and effective means of informing their customers what portions of their total bill are attributable to taxes.'" *Id.* at *33 (quoting AT&T's motion). With respect to Kentucky's contention that the ban on line

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[3] *Rudolph* involved a challenge by an interexchange carrier. The court also invalidated the Kentucky law at the request of a local exchange carrier. *BellSouth Telecomm., Inc. v. Farris*, 2007 U.S. Dist. LEXIS 13993 (E.D. Ky. Feb. 27, 2007). A preliminary injunction has been granted to wireless carriers in a case that was stayed pending appeal of the other cases. *Cingular Wireless LLC v. Rudolph*, No. 3:05-cv-81-KKC (E.D. Ky. March 23, 2007).

items advanced the state's interest in preventing misleading speech, the court noted that the statute prohibits all line items "whether the line item contains accurate information or not." *Id.* at *42. The court invalidated the Kentucky statute because it "prohibits substantially more speech than necessary to advance the government's interest in preventing Kentucky citizens from being misled." *Id.* at *44. Having found the statute unconstitutional under the First Amendment, the court declined to address AT&T's preemption argument. *Id.* at *46-47.

Together with the Washington decisions discussed in our petition (Pet. 15-16) and the Texas litigation cited by respondents, the Kentucky decision shows that litigation will continue concerning the permissibility of line item bans. In addition, the Kentucky court correctly concluded that such bans either will cause carriers to increase rates on all their subscribers or will cause them to abandon national and regional rate plans. Consumers are harmed as a result of either choice. If carriers raise their rates generally, subscribers essentially pay for taxes imposed by jurisdictions where they do not reside. If wireless carriers abandon their national and regional rate plans, customers will find it more difficult to compare the rates charged by different carriers.

Rather than requiring the lower courts to continue to evaluate First Amendment and Commerce Clause arguments, it makes sense for this Court to address the issue now. Although preemption is based on the Supremacy Clause, it seems more consistent with the constitutional avoidance canon for this Court to determine whether the FCC permissibly interpreted section 332(c)(3)(A) than to require additional litigation concerning the First Amendment and the Commerce Clause. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Finally, NASUCA and NARUC note the Solicitor General's absence from this case and suggest that his absence supports their contention that the case does not warrant further review. Opp. 18-19. As an initial matter, wireless carriers and their subscribers, rather than the FCC, will bear the brunt of the Eleventh Circuit's decision because they will pay the hidden taxes the decision will encourage. In any event, it bears note that the FCC sought rehearing in the Eleventh Circuit, arguing that the court had erroneously construed section 332(c)(3)(A) in ways that will harm wireless carriers and their subscribers. The FCC explained that, if the decision below stands, a wireless carrier "almost certainly would find it necessary to pass through the cost of [a state and local] tax to its customers nationwide in its general rates for service." FCC Petition for Rehearing by the Panel at 8. The FCC added that "[c]ustomers in other states would thus bear the costs of that state tax through their payment of higher CMRS charges, solely because the taxing state's regulation does not permit the CMRS carrier to impose a line item on its customers in that state." *Id.* at 8-9. In its Order, the FCC considered the possibility that carriers instead would abandon national rate plans and, because of that possibility, concluded that state regulation of line items is "inconsistent with the federal policy of a uniform, national and deregulatory framework" for wireless service. Pet. App. 75a.

The Court may rely on those statements by the FCC. Alternatively, the Court may find it useful to call for a response from the federal respondents.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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